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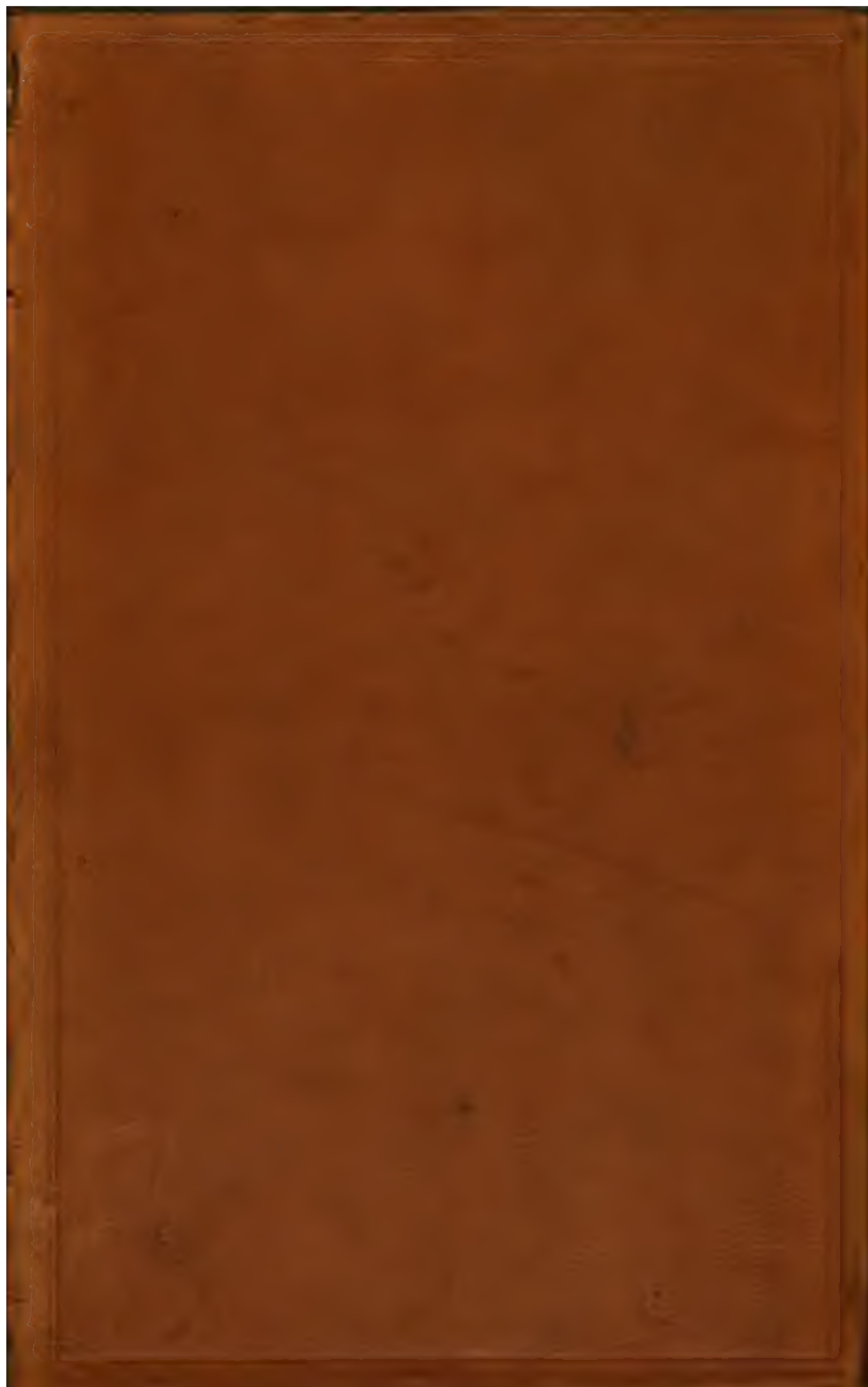
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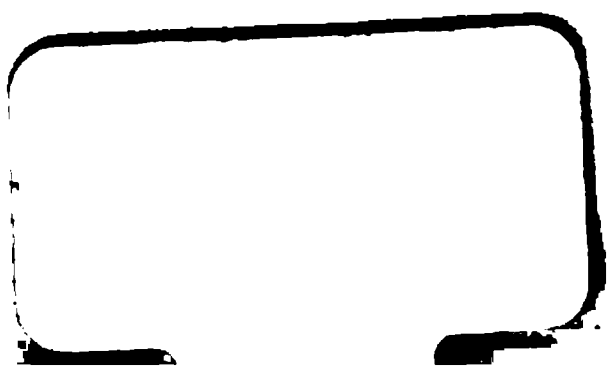
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RAILROAD REPORTS

**(Vol. 48 American and English
Railroad Cases, New Series)**

A COLLECTION OF ALL,

**CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT**

• IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

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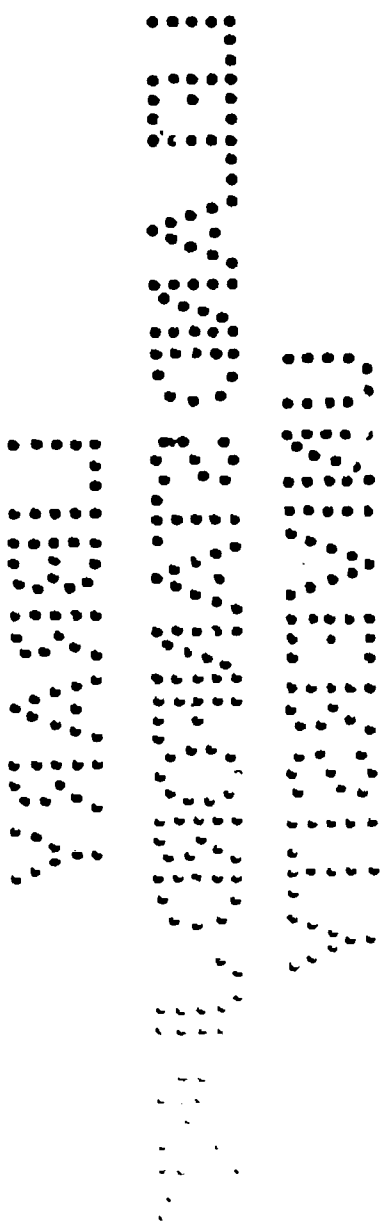


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RAILROAD REPORTS

DROWN *v.* NORTHERN OHIO TRACTION CO.

(Supreme Court of Ohio, May 7, 1907.)

[81 N. E. Rep. 326.]

Negligence—Contributory Negligence.*—Where both the plaintiff and the defendant were negligent, and the negligence of both directly contributed to produce the injury, the plaintiff has no right to recover; and in such case, when the defendant asks the court to so instruct the jury, in unambiguous terms, a refusal to so instruct is error. *Pittsburg, Ft. W. & C. Ry. Co. v. Krichbaum's Adm'r*, 24 Ohio St. 119, and *Timmons v. Central Ohio Railroad Co.*, 6 Ohio St. 105, approved and followed.

Same—Last Chance.†—The doctrine of "last chance," as formulated in *Railroad Co. v. Kassen*, 31 N. E. 282, 49 Ohio St. 230, paragraph 1 of syllabus, does not apply where the plaintiff has been negligent, and his negligence continues, and, concurrently with the negligence of defendant, directly contributes to produce the injury; it applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff so that the negligence of defendant is clearly the proximate cause of the injury, and that of the plaintiff the remote cause.

Same—Pleading.—Since the plaintiff can recover only upon the allegations of his petition, he cannot recover upon negligence which warrants the application of the rule of "last chance," without alleging it in his petition.

(Syllabus by the Court.)

Error to Circuit Court, Summit County.

Action by one Drown against the Northern Ohio Traction Company. Judgment of the court of common pleas for plaintiff

*For the authorities in this series on the question whether there may be a recovery on account of simple negligence where there was also contributory negligence, see foot-notes appended to *Louisville & N. R. Co. v. Sights* (Ky.), 21 R. R. R. 856, 44 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Schmidt v. Missouri Pac. Ry. Co.* (Mo.), 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806; foot-notes appended to *Cole v. Blue Ridge Ry. Co.* (S. Car.), 21 R. R. R. 606, 44 Am. & Eng. R. Cas., N. S., 606.

†For the authorities in this series on the subject of the last clear chance doctrine, see foot-notes appended to *Hanson v. Manchester St. Ry.* (N. H.), 22 R. R. R. 675, 45 Am. & Eng. R. Cas., N. S., 675; *Reid v. Atlanta, etc., Ry. Co.* (N. Car.), 22 R. R. R. 670, 45 Am. & Eng. R. Cas., N. S., 670; foot-notes appended to *Chesapeake & O. Ry. Co. v. Farrow's Adm'r* (Va.), 22 R. R. R. 360, 45 Am. & Eng. R. Cas., N. S., 360; foot-notes appended to *Illinois Cent. R. Co. v. Ackerman* (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76.

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was reversed by the circuit court, and plaintiff brings error. Affirmed.

This case came into the court of common pleas of Summit county by appeal from a justice of the peace. It was an action to recover damages for an injury, by an electric car belonging to the defendant, to a buggy and a pair of horses hitched thereto. The petition alleged no other specific act of negligence by the defendant than that the car of the defendant was running at a high and dangerous rate of speed, without sounding a signal, and without warning of any kind, in violation of an ordinance of the city of Akron, and without keeping any lookout for persons driving on the street. The defendant denied all the allegations of negligence, and, further answering, alleged that if the property of plaintiff was injured or damaged in any way it was the direct result of the carelessness and negligence of the plaintiff and of the person driving the team of horses owned by the plaintiff; that the person driving said team carelessly and negligently drove upon the track of the defendant in front of an approaching car, without looking for an approaching car, or taking any precaution for his safety or the safety of the team; that the approach of the car could have been seen and heard by the person driving the team, had he used ordinary care or looked for an approaching car; that the person driving the team drove upon the tracks of the defendant in front of an approaching car, which was so close to the team at the time it was driven upon said track that it was impossible to stop the car. And the defendant also further avers that any injury or damages sustained by the plaintiff was the result of the negligence of the plaintiff and the person driving the team directly contributing thereto. The reply denied each and every allegation contained in the answer, except so far as they are admissions of the plaintiff's petition. The circumstances of the case, as developed in the evidence, are as follows: A span of horses, harnessed to a top buggy belonging to the plaintiff in error and driven by one Hardy, was going south on Main street, in the city of Akron, having come onto Main street from Coburn street. There was a loaded wagon standing on the west side of Main street, with a span of horses attached to it, hitched to a post. The point at which the plaintiff in error's team came upon Main street was about 200 or 250 feet north from the point where the accident occurred. When the driver reached Main street, he looked to the north for an approaching car, but saw none. He did not look back of him after he started southward upon Main street. There was a double track on Main street. The team was driven at the rate of seven or eight miles an hour south upon the street and, seeing a wagon extending to within a few feet of the street car track on the west side of the street, Hardy drove astride of the west rail of the west track, in order to avoid it. A short distance beyond the wagon, which was hitched in the street, the buggy and horses were struck by the car. The driver, Hardy, testifies that the accident occurred as he was leaving the track upon which he had driven to go around the wagon. The motorman and one other wit-

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ness called by the plaintiff testify that the accident occurred as the team was driven upon the west track. The motorman and two other employees of the defendant company testify that, on the trial before the justice of the peace, Hardy testified that the accident occurred as he drove upon the track to pass around the team which was hitched in the street. Hardy denies this.

The court was asked to instruct the jury in several propositions, only two of which it is necessary to quote. They are as follows: "(3) If the jury find from the evidence that the plaintiff, through his agent, Hardy, and the defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant. (4) If the jury find that the negligence of both plaintiff's agent and the defendant combined so as to directly cause the injury complained of by plaintiff, then your verdict should be for the defendant." These requests to charge were refused by the court, but the court did charge the jury as follows: "I say to you, gentlemen of the jury, that if you find from all the evidence that the motorman, who had charge of the car which struck Hardy's team, could by the exercise of ordinary care have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car Hardy's team was knocked down and injured, it would be such negligence on the part of the defendant as would enable the plaintiff to recover, provided Hardy was free from contributory negligence on his part; or if the motorman saw Hardy's team on the track, or by the exercise of ordinary care could have seen it in time to stop the car, but did not, and purposely, willfully, and wantonly ran into it, then defendant would be guilty of negligence, and the plaintiff would be entitled to recover under such circumstances, even if plaintiff's agent was guilty of contributory negligence in being on the track in front of the car at the time of the injury. * * * The court instructs the jury that one who is injured by the mere negligence of another cannot recover any compensation for his injury, if, by his own negligence, he contributed to produce the injury of which he complains, so that but for his, or his agent's, concurring or co-operating fault, the injury would not have happened to him, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's or his agent's negligence, or by the exercise of ordinary care could have become aware of such negligence, failed to use a proper degree of care to avoid the consequences of such negligence. The court instructs the jury that notwithstanding the jury may find that the plaintiff or his agent was guilty of negligence, and that such negligence contributed to the injury of which he complains, yet still if the agents of the defendant were aware of such negligence in time, by the use of ordinary care and prudence, to have avoided the effect of such negligence on Hardy's part, but did not do so, then such negligence on his part is not such contributory negligence as to constitute a defense to this action. What I mean by that, gentlemen, so as to make no mistake, is that if Hardy was

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on this track driving south, and you find that he was negligent in being on it as he was, his failure to look, or failure to watch, to avoid injury, if he was negligent, that that would not prevent him from recovering in this suit, if the motorman of the car, after discovering him in that position, could have, by the use of reasonable and ordinary care on his part, avoided the injury by stopping the car. Now, gentlemen, that is a question of fact for you to determine from all the facts and circumstances in the case, and I leave that question wholly for you to determine impartially and justly, according to the testimony."

The defendant excepted to the charge generally, and to each and every part thereof, and to the refusal to charge as requested. The jury returned a verdict in favor of the plaintiff, motion for new trial was overruled, and judgment rendered upon the verdict. On petition in error, the circuit court reversed the judgment of the court of common pleas and remanded the cause to the said court to be proceeded in according to law and the rights of the parties. The plaintiff in error seeks to have the judgment of the circuit court reversed, and the judgment of the court of common pleas affirmed.

G. M. Anderson and A. J. Wilhelm, for plaintiff in error.

Rogers, Rowley & Rockwell, for defendant in error.

DAVIS, J. (after stating the facts). Under the issues in this case evidence was introduced tending to prove that the plaintiff's agent was guilty of negligence directly contributing to the injury to plaintiff's property. If the driver of the plaintiff's team, immediately upon entering Main street, and without afterwards looking to the north, as he admits, drove southward upon the track until the car coming from the north overtook and collided with the buggy, he was negligent, because the street was open and unobstructed for from 200 to 250 feet from the point at which he entered upon it, and it was not necessary for him to go upon the street railway track, and because, the night being dark he unnecessarily put himself in an obvious place of danger, and continued therein until the moment of the accident, without looking out for an approaching car or doing anything whatever to avoid injury, apparently risking his life and the property of his principal upon the presumption that the defendant's employees would make no mistakes nor be guilty of any negligence. If, on the other hand, he drove along the street until he came to the obstruction, and then turned out upon the track to go around it, without again looking, as his own testimony shows that he did not, and was then almost in the same instant struck by the car, he was negligent. Upon either hypothesis, assuming that the defendant was negligent in not keeping a proper lookout, or was otherwise not exercising ordinary care to prevent collision with persons lawfully on its track, the plaintiff could not recover, if it should appear in the case that the negligence of both is contemporaneous and continuing until after the moment of the accident, because in such case the negligence of each is a direct cause of the

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injury, without which it would not have occurred, rendering it impracticable in all such instances, if not impossible, to apportion the responsibility and the damages. Suppose, for example, that not only the buggy and horses had been injured, but the defendant's car also, by what standard could the extent of liability of either party be determined? *Timmons v. Central Ohio Railroad Co.*, 6 Ohio St. 105; *Village of Conneaut v. Neaf*, 54 Ohio St. 529, 531, 44 N. E. 236. In short, there can be no recovery in such a case unless the whole doctrine of contributory negligence, a doctrine founded in reason and justice, should be abolished.

Under these circumstances, therefore, it was not sufficient to say to the jury that if they should find that the motorman who had charge of the car which struck the team could by the exercise of ordinary care have seen the team, and could have stopped the car, and that by reason of the failure to do so the team was injured, it would be such negligence by the defendant as would entitle the plaintiff to recover, provided, that the plaintiff's driver was "free from contributory negligence." The defendant had the right to have the jury specifically instructed, as it requested, that if the jury should find from the evidence that both the plaintiff and the defendant, through their agents, were negligent, and that the negligence of both combined so as to directly cause the injury complained of, then the verdict should be for the defendant. The court refused to so instruct the jury, and the circuit court correctly held that the refusal to so charge was erroneous.

The error in refusing the defendant's request to charge was extended and made much more prejudicial when the court, after giving instructions as to contributory negligence by the plaintiff in very general terms, proceeded to impress upon the jury, by repetition and with some emphasis, the doctrine known as "the last chance." This doctrine is logically irreconcilable with the doctrine of contributory negligence, and accordingly it has been vigorously criticised and warmly defended. Probably, as in many such controversies, the truth lies in middle ground; but it is certain that it is only applicable in exceptional cases and the prevalent habit of incorporating it in almost every charge to the jury in negligence cases in connection with and often as a part of, instructions upon the subject of contributory negligence is misleading and dangerous. This confusion seems to arise either from misapprehension of the law or a want of definite thinking. The doctrine of the "last chance" has been clearly defined by a well-known text-writer as follows: "Although a person comes upon the track negligently yet if the servants of the railway company, *after they see* his danger, can avoid injuring him, they are bound to do so. And, according to the better view with reference to injuries to travelers at highway crossings—as distinguished from injuries to *trespassers* and *bare licensees* upon railway tracks at places where they have no legal right to be—the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company

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will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them." 2 Thompson, Negligence, § 1629. (The italics are the author's). Now, it must be apparent, upon even a slight analysis of this rule, that it can be applied only in cases where the negligence of the defendant is proximate, and that of the plaintiff remote, for if the plaintiff and the defendant both be negligent, and the negligence of both be concurrent and directly contributing to produce the accident, then the case is one of contributory negligence pure and simple. But if the plaintiff's negligence merely put him in the place of danger, and stopped there, not actively continuing until the moment of the accident, and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury, and that of the plaintiff is a remote cause. This is all there is of the so-called doctrine of "the last clear chance." A good illustration is found in the case of *railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282. Kassen walked through the rear car of the train on which he was a passenger to the rear platform, from which he either stepped off or fell off upon the track, where he lay for about two hours, when he was run over by another train. It was held that, although Kassen may have been negligent in going upon the rear platform and stepping or falling off, yet since the railroad company knew of his peril, and had ample time to remove him or to notify the trainmen on the later train, its negligence in not doing so was the proximate cause of Kassen's death, and the negligence of Kassen was remote. In that case the proximate cause and the remote cause were so clearly distinguishable, and it is so very evident from the opinion and the syllabus that this distinction was the real ground of the judgment of the court, that it is somewhat surprising that the doctrine of last chance, as stated in that case, should have been so often misinterpreted as a qualification of the doctrine of contributory negligence.

It is clear, then, that the last chance rule should not be given as a hit or miss rule in every case involving negligence. It should be given with discrimination. Since the plaintiff can recover only upon the allegations of his petition, if there is no charge in the petition that defendant, after having notice of the plaintiff's peril, could have avoided the injury to plaintiff, and there is no testimony to support such charge, the giving of such a charge would be erroneous. There is no such allegation in the petition in this case. But, further, there is testimony tending to prove that the plaintiff's team was driven upon the street railway track in the nighttime, ahead of the car, and that it continued on the track for a distance of 250 feet until struck by the car, without taking any precaution to avoid accident. Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding

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the accident, yet the plaintiff's negligence was continuous and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant, which was independent of the concurrent negligence and which made the latter remote. Therefore there was no place in the case for the doctrine of "the last clear chance." There is a case, which was decided in the sixth circuit, which will illustrate our views, and a reference to it may save some further discussion. It is the case of *Lake Shore & Michigan Southern Railway Co. v. Callahan*, 2 Ohio Cir. Ct. Rep. (N. S.) 326, 15 O. C. D. 115. A railroad sectionman, in obedience to an order by his foreman, started to walk along the track with his back to a locomotive 200 or 300 feet away, but without observing whether the engine was standing still or running backward, and he walked along the track for 75 feet without paying any further attention to the engine, which was in fact backing toward him, and was struck by it and injured. The court held that it was a case of concurrent negligence, continuing to the moment of the injury; that the doctrine of "the last chance" did not apply; and that plaintiff was guilty of contributory negligence. Similar views were expressed by the New York Court of appeals, in *Rider v. Syracuse R. T. Co.*, 171 N. Y. 139, 148, 63 N. E. 836, 58 L. R. A. 125, per O'Brien, J., as follows: "The contributory negligence of the injured party cannot be taken from the jury, except in cases where it is clear that there was some new act of negligence on the part of a defendant that was the proximate cause of the injury. The negligence of the deceased, if any, was substantially concurrent with that of the defendant, if any. It is impossible to separate that part of the transaction which took place after the first contact of the car with the vehicle from what took place before. It was all one transaction, and to attempt to divide it into fragments, and impute one part of it to the negligence of both parties and another part to the defendant's negligence alone, would, as it seems to us, entirely subvert the law of contributory negligence as applied to accidents of this character. If the theory upon which this case was tried and submitted is to be sanctioned, it must, we think, follow that in every case based upon such an accident the result must turn, not upon the general rule as stated, but upon the exception; or, in other words, the inquiry must be not whether the injured party was negligent, but whether it was reasonably possible for the defendant to have avoided the accident."

We do not feel willing to close this opinion without reference to *P., Ft. W. & C. Ry. Co. v. Krichbaum's Adm'r*, 24 Ohio St. 121. While the whole of the court's opinion, delivered by McIlvaine, J., is pertinent, we quote only the following: "Neither of these instructions, however, indicated the rule by which the jury should be governed, in case they found the injury to have resulted from combined causes, to wit, the co-operation of negligent conduct on the part of both the defendant and the deceased. With regard to the rule in such case, the court gave to the jury two proposi-

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tions, as follows: 'It matters not how careless the servants of the defendant may have been, the plaintiff ought not to recover, if the deceased or his father could have avoided the collision by the exercise of care, diligence, and prudence. On the other hand, it matters not how careless the deceased and his father may have been, if the persons running the train could, by the exercise of ordinary care, prudence, and diligence, have avoided the collision, and did not, then the plaintiff ought to recover.' The first proposition was quite as favorable to the defendant as it should have been, but the latter was to its prejudice and is wholly indefensible."

WINTERBOTTOM *et al.* v. PHILADELPHIA, B. & W. R. Co.

(Supreme Court of Pennsylvania, April 22, 1907.)

[66 Atl. Rep. 864.]

Railroads—Accidents at Crossing—Evidence.*—In an action for injuries to a boy run over at a crossing, where the evidence of witnesses for defendant that the proper signals were given was contradicted by witnesses for the plaintiff, the court will not say as a matter of law that the negative testimony for plaintiff was insufficient to overcome the positive testimony for defendant.

Appeal from Court of Common Pleas, Delaware County.

Action by Jane E. Winterbottom, in her own right, and Francis Maurice Winterbottom, by his mother, Jane E. Winterbottom, against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

J. B. Hannum, for appellant.

A. B. Geary, for appellees.

ELKIN, J. The assignments of error raise three questions: First, was there sufficient evidence to go to the jury on the question of the failure to give proper signals before approaching the crossing? Second, even if it be conceded that the signals were not given, was the failure so to do the proximate cause of the accident? and, third, was the boy making such an unlawful use of the crossing as to relieve defendant company from its duty to give proper signals? The appellant relies on what is termed the negative testimony of the witnesses for appellees to support its contention that

*For the authorities in this series on the question of the comparative weight of affirmative and negative testimony as to whether or not crossing signals were given, see foot-notes appended to *Keiser v. Lehigh Valley R. Co.* (Pa.), 20 R. R. R. 303, 43 Am. & Eng. R. Cas., N. S., 303; *Baltimore & O. R. Co. v. Baldwin* (C. C. A.), 21 R. R. R. 280, 44 Am. & Eng. R. Cas., N. S., 380; *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393.

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there was not sufficient evidence of negligence to go to the jury. *Hauser v. Central Railroad of New Jersey*, 147 Pa. 440, 23 Atl. 766; *Urias v. Pennsylvania Railroad Company*, 152 Pa. 326, 25 Atl. 566; *Knox v. P. & R. Ry. Co.*, 202 Pa. 504, 52 Atl. 90, and *Keiser v. Railroad Company*, 212 Pa. 409, 61 Atl. 903, 108 Am. St. Rep. 872, are relied on to support this position. It is true the court has said in these and other cases that, where the negative testimony produced by plaintiff only amounts to a scintilla, it cannot prevail over the positive and conclusive testimony of a large number of witnesses which clearly establishes the fact that the signals were given. In such cases it is the duty of the court to say as a matter of law that the negative testimony produced by the plaintiff is not sufficient to overcome the positive and conclusive testimony of the defendant bearing on this question. It may also be conceded that in some of the cases it is difficult to determine whether it is a question of law for the court or of fact for the jury. The opportunity of the witness for hearing the signals, the place where he was located at the time, whether he was on the lookout for the train and listening for the signals, are all important matters to be taken into consideration by the trial judge when he is called on to pass upon this question. In every such case it is possible to produce witnesses who can very truthfully testify that they did not hear the signals. Such testimony is of very little value unless the witnesses were in such a location as would make it highly improbable that the signals could have been given without being heard by them. In the case at bar, however, the appellees produced a witness who was seated at a window in her house, near the railroad station, waiting for a friend who was coming on the train, for which she was on the lookout, and who was listening for the signals. Another witness was produced who was standing at the station waiting for the train and listening for the signals. Both of these witnesses testified positively that they did not hear the signals. There were other witnesses to the same effect. Under all the circumstances we think it was a question for the jury to determine. We cannot say under the facts of this case that the failure to give the signals was not the proximate cause of the accident. The boy made the best effort he could to get out of his peril, even without hearing the signals, and we cannot say as a matter of law that he could not have entirely extricated himself if he had heard the signals in due time. This was a question for the jury.

On the question of the boy making an unlawful use of the crossing, the court below said that the evidence did not disclose clearly just what he was doing there, and the facts were not sufficient to justify him in saying as a matter of law that the boy was a trespasser. We do not feel like disturbing the ruling of the court in this respect under the facts of this case.

Judgment affirmed.

SCHWARZ v. DELAWARE, L. & W. R. Co.

(Supreme Court of Pennsylvania, May 13, 1907.)

[67 Atl. Rep. 213.]

Railroads—Accident at Crossing—Presumption.*—The presumption that a person killed at a railroad crossing looked and listened is not overcome by testimony of the engineer of the train that he did not see him stop, where his evidence shows he was not in position to see whether he did or not.

Same—Failure to Signal.†—Where a witness testifies that he was near a railroad crossing and was listening for an approaching train, and that he heard no whistle, his testimony, if believed, is proof that no whistle was sounded.

Same—Instructions.‡—In an action to recover for death of plaintiff's intestate at a railroad crossing, where there was nothing to show that a signal whistle could not have been heard, or that if deceased had looked and listened he would not have escaped injury, it was error to charge that the jury could find for plaintiff simply because the train was run at a high rate of speed.

Same.§—Where one about to cross a railroad track in an open country looks and listens, and no train is heard, and no signal given, the railroad company is liable if it runs its trains at such a reckless rate of speed as would injure an unwarned traveler.

Appeal from Court of Common Pleas, Monroe County.

Action by Richard F. Schwarz against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

See 61 Atl. 255.

At the trial defendant presented the following points:

“(1) Under all the evidence in this case, the verdict of the jury

*For the authorities in this series on the subject of the sufficiency of evidence to rebut the presumption of due care on the part of a person killed by a train or car, see foot-notes appended to *Porter v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 342; *Wilson v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356.

†For the authorities in this series on the subject of the weight of negative testimony as to whether or not crossing signals were given, see foot-notes appended to *Hoffard v. Illinois Cent. Ry. Co.* (Iowa), 23 R. R. R. 236, 46 Am. & Eng. R. Cas., N. S., 236.

‡For the authorities in this series on the subject of the combined effect of contributory negligence and negligence with respect to the speed of train or car at crossing, see foot-notes appended to *Illinois Cent. R. Co. v. Arkeman* (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76.

§For the authorities in this series on the subject of the combined effect of excessive or fast speed of trains or cars and failure to give crossing signals, see *Norris v. New York, etc., R. Co.* (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17 (negligence in running train over crossing at 40 miles an hour without giving crossing sig-

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should be for the defendant. Answer: The first point is refused without reading."

"(3) In the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed, to stop, look, and listen at a safe and proper place before driving upon the crossing. This presumption is a presumption of fact and is slight and faint at the best in this class of cases, and is completely overthrown by the affirmative proof to the contrary by the witness Riley, who testified that he was watching the horses and wagon from a point at least 30 feet away from the crossing, and that they did not stop before they were struck. Answer: The third point is refused without reading."

"(5) There is no limit to the rate of speed at which a railroad company may run its trains through the open country and over the crossings of country roads, so long as the bounds of safety to patrons are not transgressed. Answer: The fifth point is refused without reading.

"(6) Where the exact rate of speed of a train, as shown by its schedule and testified to by the engineer, who was running the same shows a rate of speed of 45 miles an hour, the court will consider of no value the testimony of a witness who states that the train was running very fast, but does not state how fast, nor fix any standard by which the speed of the train could be ascertained. Answer: The sixth point is refused without reading.

"(7) It is not negligence for a railroad company to run a passenger train in the nighttime or early morning an hour behind its schedule time and over a country crossing at the rate of 45 miles an hour. Answer: The seventh point is refused without reading; it being covered in the general charge.

nals); *West v. Northern Pac. Ry. Co.* (N. Dak.), 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655 (contributory negligence, excessive speed, and the absence of signals); *Green v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 793, 41 Am. & Eng. R. Cas., N. S., 793 (contributory negligence, unlawful speed of train, and failure to give statutory signals, railroad not liable for injury to pedestrian); *Louisville & N. R. Co. v. Molloy's Adm'r* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714 (where speed of a train is great, care commensurate with the danger in giving warning of the approach of train must be observed); *Moore v. Lindell Ry. Co.* (Mo.), 8 R. R. R. 46, 31 Am. & Eng. R. Cas., N. S., 46 (no recovery where failure to signal and excessive speed and subsequent contributory negligence); *Crawford v. Chicago G. W. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 628 (contributory negligence as affected by failure to give signals and excessive speed); *Neal v. Carolina Cent. R. Co.* (N. Car.), 18 Am. & Eng. R. Cas., N. S., 51 (contributory negligence will bar recovery, though train was violating ordinance as to speed and there was negligence as to signals and lookout); *Schneider v. Chicago, M. & St. P. Ry. Co.* (Wis.), 11 Am. & Eng. R. Cas., N. S., 81 (effect of failure to give signals and excessive speed at crossing on contributory negligence); *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.); 20 Am. & Eng. R. Cas., N. S., 700 (liability a question for jury where there was contributory negligence and speed in violation of ordinance); *Georgia R. & B. Co. v. Cromer* (Ga.), 12 Am. & Eng. R. Cas., N. S., 318 (rate of speed and signals at country crossings, negligence as to a question for jury).

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“(8) The negative testimony of five witnesses that they did not hear the whistle blown, especially where all of said witnesses were a long distance away from the point where it became the duty of the engineer to blow his whistle, it being no part of the duty of such witnesses to listen for the approaching train or its signal, and their attention not having been called to the fact of whether or not the whistle was blown by any circumstance whatever, amounts only to a scintilla, and cannot prevail against the overwhelming and positive testimony of the engineer and all the members of the train crew, and of two other wholly disinterested witnesses who were standing, the one about 100 feet, and the other about 200 feet, from the engine when it was whistling, and who watched it as it whistled, and testify positively that the train did whistle. In such a case this positive testimony conclusively establishes the fact that the trainmen performed their duty, and the plaintiff is not entitled to recover. Answer: The eighth point is refused without reading.”

The court charged in part as follows:

“There is one question involved in the matter, and that is the question of speed. Ordinarily a railroad company has the right in the country districts, in the open country, to run its trains at such speed as it believes to be right or thinks proper. That is the general principle of law. If, however, the circumstances in any case are such that running a train at a high rate of speed would prevent a person entering a crossing to get over before the train would get at the crossing, then it is the duty of the railroad company to moderate its speed. I state the matter plain in this connection, in order that there will be no quibbling about what the court says, and in order that, if the court is wrong, it may be consistently wrong.”

“Where there is much travel at all hours over a crossing, it is the duty of the company not to accelerate, but to moderate, the speed of its trains. This, of course, applies to only exceptional cases. Ordinarily the ordinary country crossing does not admit of any qualification of this rule; but, where the circumstances are different, there, it is the duty of the company to moderate its speed. Now, in this case, you will remember there is some testimony that at the crossing there was a creek near by, the noise of which may have prevented the hearing of approaching trains, and the alarm given thereby. There is also some testimony that there was a tieyard along the road, between the road and the railroad track. There is also some testimony that there was a bluff along the track in the neighborhood of this crossing or a little beyond, and there is also testimony that there were trees in foliage along the track. Whether all these elements would be present to determine at what distance the whistle should sound, and as to what speed the locomotive and the train should approach the crossing, is a matter for you to determine. The question is: What was the speed of the train upon this day? And, after you have determined that, then the question is: Taking the alarm given, and the place it was given, would it afford sufficient time for a person entering

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upon the track of a railroad to pass over or to back, if that were feasible, in order to get out of the way of the approaching train?"

"The engineer testified that the speed was 45 miles an hour—that is my recollection of it—and the train crew testified to a speed of varying from 30 to 40 miles an hour, as I remember it, but, what the exact figures are, they are for you. The witnesses for the plaintiff testified that the speed was a rapid one, but I do not think any of them testified to a certain rate of speed. It is apparent, gentlemen of the jury, that all these statements are but estimates. We have no testimony in this case which would fix with mathematical precision the exact rate of speed that the train was going at, at the time that these boys were struck, and it is therefore for you, under all the evidence in the case, to determine at what rate of speed this train was going, and I recur to this, and you may apply it to my former instructions as to the rate of speed as bearing upon the question as to whether the alarm was given at the right place, and whether it was sufficiently given, under all the surroundings in this case, as described by the witnesses."

Verdict and judgment for plaintiff for \$4,282.50. Defendant appealed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

A. Mitchell Palmer and Everett Warren, for appellant.

F. B. Holmes, J. H. Shull, C. C. Shull, and Samuel E. Shull, for appellee.

BROWN, J. When this case was here before (211 Pa. 625, 61 Atl. 255) on appeal from the refusal of the court below to take off a judgment of nonsuit, we hold that on the evidence submitted by the plaintiff the liability of the defendant was for a jury. On this second trial nothing offered by way of defense would have justified the court in directing a verdict for the appellant, and, but for a single error, the judgment would be affirmed.

The first contention of the appellant is that, from the testimony submitted by it, the presumption that the deceased had stopped, looked, and listened was completely overcome, and the court ought to have so instructed the jury. But a single witness, the engineer in charge of the locomotive, was called in the attempt to show that they had not stopped. He, however, does not say that they did not stop. His testimony is: "I did not see them stop." It is fairly argued by counsel for appellee that he was not able to say they had not stopped. He admits that between his seat in the locomotive and the road the boiler intervened, at an elevation of nine inches above the level of his eyes. This in itself would have prevented his full view of the team as it approached the railroad, and he says that if the deceased had stopped at the foot of the ascent to the tracks he could not have seen them. His testimony as a whole, instead of having the effect claimed for it by the appellant, could have been of little, if any, use to the jury on the question of stopping.

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A second complaint of the appellant is that, in view of the positive testimony submitted by it that proper notice of the approach of the train had been given by a whistle, the court ought not to have permitted the jury to find that such warning had not been given on what is termed the negative testimony of plaintiff's witness. When a witness testifies that, at or near a railroad crossing, his attention was upon an approaching train, that he was listening for it, heard its approach and heard no whistle, his testimony is not of a negative grade, but may be regarded, if believed, as proof that no whistle had been sounded, and it receives additional weight when taken in connection with the testimony of other witnesses which may be of a negative character. *Longenecker v. Penna. R. R. Co.*, 105 Pa. 328; *Quigley v. Canal Co.*, 142 Pa. 388, 21 Atl. 827, 24 Am. St. Rep. 504; *Daubert v. Delaware, Lackawanna & Western R. R. Co.*, 199 Pa. 345, 49 Atl. 72. Five witnesses were called by the plaintiff who testified they heard no whistle before the train struck the wagon. Four of them were in close proximity to the crossing, and one of them, James Anderson, a railroader of five years' experience, was at work in his yard. He testified that when he heard the train coming he stopped work and listened for a minute or more. At the rate of speed testified to by the engineer, it must then have been three-quarters of a mile away from him. He said he listened and heard no whistle. This testimony could not be ignored. The weight of the testimony as to the whistling may have been with the defendant; but, even if the court below so thought, and we so think, it conflicted with that submitted by the plaintiff, sufficiently, if believed, to justify a finding that the whistle had not been blown, and it was therefore for the jury alone to pass upon this important disputed question of fact. *Cromley v. Penn. R. R. Co.*, 211 Pa. 429, 60 Atl. 1007.

As the case must be retired, we need not consider the tenth assignment, which complains of the court's refusal to allow the appellant to file an additional reason for a new trial. The timetable offered in evidence by the plaintiff, showing the distance between Stroudsburg and Water Gap, was published by the company itself, and therefore presumably correct. It was offered in evidence to show the distance between these points, as a basis for fixing the speed at which the train was approaching the crossing. The sole objection to it as evidence was that the distance as given in it between the stations was only approximate, that it had not been printed for the purpose of showing the distance with any accuracy, but only for the general information of travelers. It was admitted with leave to the company to show that it was not correct, and, as the objection to it was properly overruled, the eleventh assignment is dismissed.

In his instruction to the jury, the trial judge said: "There is one question involved in the matter, and that is the question of speed. Ordinarily, a railroad company has the right in the country, to run its trains at such speed as it believes to be right or thinks proper. That is the general principle of law. If, however, the circumstances in any case are of such that running a train at a high rate of speed would prevent a person enter-

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ing a crossing to get over before the train would get at the crossing, then it is the duty of the railroad company to moderate its speed. I state the matter plain in this connection, in order that there will be no quibbling about what the court says, and in order that, if the court is wrong, it may be consistently wrong." This was error, repeated in the court's refusal to affirm the fifth and seventh points presented by defendant. From that portion of the charge quoted, the jury might have found a verdict in favor of the plaintiff simply because the train was running at a high rate of speed, even if the proper warning had been given of its approach. There was nothing in the case to show that the warning, by a whistle, of the approach of a train at the crossing, could not be heard; nothing to show that looking and listening would not protect the traveler from danger at that point. Further on, the trial judge said what is the subject of the eighth assignment of error: "Where there is much travel at all hours over a crossing, it is the duty of the company, not to accelerate, but to moderate, the speed of its train. This, of course, applies to only exceptional cases. Ordinarily the ordinary country crossing does not admit of any qualification of this rule: But, where the circumstances are different, there, it is the duty of the company to moderate its speed. Now, in this case, you will remember there is some testimony that at the crossing there was a creek near by, the noise of which may have prevented the hearing of approaching trains, and the alarm given thereby. There is also some testimony that there was a tieyard along the road, between the road and the railroad track. there is also some testimony that there was a bluff along the track in the neighborhood of this crossing or a little beyond, and there is also testimony that there were trees in foliage along the track. Whether all of these elements would be present to determine at what distance the whistle should sound, and as to what speed the locomotive and the train should approach the crossing, is a matter for you to determine. The question is: What was the speed of the train upon this day? And, after you have determined that, then the question is: Taking the alarm given, and the place it was given, would it afford sufficient time for a person entering upon the track of the railroad to pass over or to back, if that were feasible, in order to get out of the way of the approaching train?

If the question had been as to where the whistle ought to have blown, there might have been no error in the court's submitting the rate of speed to the jury to enable them to determine how far from the crossing the signal ought to have been given. The instructions complained of may have been intended for that purpose, but they could hardly have been so understood by the jury, for they were told that, where there is travel at all hours over a crossing, it is the duty of the company to moderate the speed of its trains. There was nothing to show that a traveler approaching this crossing could not have heard the whistle if it had been sounded. The case was tried on the theory that no whistle had been blown, not as to where it ought to have been blown, and the

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speed of the train was not involved. The crossing was in an open country, and in the direction from which the train was coming there was an unobstructed view of 600 feet. Its speed was immaterial, for sight and sound would have availed to protect the deceased from collision with it. It is not the rate of speed that prevents a traveler from passing safely over a railroad crossing in an open country, but the failure to give notice of the approach of the train by those in charge of it, or disregard of such notice by the traveler when given. What we said in 211 Pa., 61 Atl., may have been misunderstood by the trial judge. All that was there said, or intended to be said, was that if one about to cross a railroad in the open country stops and listens, and no train is heard—that is, no warning of its approach is given by the engineer—the railroad company cannot, under such circumstances, run its train at such a reckless rate of speed as will run down the unwarned traveler. This simply means that it is not the rate of speed that is the negligence of the company, but the failure to give proper notice of the approach of the train. With proper warning given of such approach in an open country, rate of speed is not a question in determining whether the railroad company was negligent, and this has been settled in our own and other states.

In *Reading & Columbia R. R. Co. v. Ritchie*, 102 Pa. 425, we said: "The very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight. It is authorized by law, and a railroad company in propelling its trains at high speed along its tracks in the open country is simply engaged in the lawful exercise of its franchise. If it is evidence of negligence that a train is run at this rate of speed, it must be because running at a less rate is a legal duty; but there is no such duty established either by statute or decision." One of the complaints of the plaintiff in *Childs v. Pennsylvania R. R. Co.*, 150 Pa. 73, 24 Atl. 341, whose husband was killed at a railroad crossing in a rural portion of Philadelphia, was the rate of the speed of the train; the testimony showing it to have been from 45 to 50 miles an hour. She was allowed to recover because the jury found proper warning had not been given of the approach of the train; but, as to her contention that its speed was negligence, it was said: "We do not think any question of negligence grows out of the rate of speed upon these facts. The right of a railroad to move its trains at such rate as the necessities of its business, or the requirements of the public may make necessary, is subject only to such restrictions as may be found necessary in cities and populous towns. In the crowded centers of business and population the public safety requires the speed to be moderated, but in the open country the single traveler over the wagon road may, under all ordinary circumstances, provide for his safety by compliance with the rule of law and of common sense that requires him to stop, look each way along the track, and to listen, for an approaching train, before attempting to cross the track. The movement of trains must be regulated by the railroad companies in the exercise of a business discretion, and upon con-

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sideration of the competition they have to encounter and the necessities of modern business. We do not think a jury may fix the maximum rate of speed at which a train shall be moved in the open country, or that a high rate of speed is negligence per se; but, while railroad companies may move their trains at such rate of speed as the character of their machinery and roadbed may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty." In *Newhard v. Pennsylvania R. R. Co.*, 153 Pa. 417, 26 Atl. 105, 19 L. R. A. 563, the plaintiff was driving a wagon over a grade crossing in an open country, and was injured by collision with one of the company's trains. The train was running over the crossing at the rate of 50 miles an hour. It was alleged that this was negligence, and that the duty of the company was to slow up at the crossing; but we said: "Wherein did the defendant in any particular fail in duty? It gave the signal of its approach to the crossing by the steam whistle. This was a duty which the law imposed, and was performed. But, it is argued, it was negligence in defendant to maintain the speed of 50 miles an hour in its approach to the crossing, for if it had 'slowed up' the plaintiff could have cleared the crossing before the train reached it. The weakness of this argument is in the implied duty it imposes on the railroad company of conceding the superior right of the traveler to the crossing; undoubtedly, when both are approaching the crossing at a rate of speed which would put them on it at the same time, unless one or the other 'slows up' or stops, disaster to one or the other, or both, follows. If the train had given the proper warning signal to the traveler of its intention immediately for a very short space of time to occupy the crossing, the further duty of 'slowing up' or stopping until the traveler has safely passed is not by law imposed upon it; that duty is on the traveler. In passing over a street in a city, town, or village, the circumstances being wholly different from a crossing in the country, ordinary care changes the duty, because these street crossings usually are at short intervals. The view of the traveler from the cross streets is obstructed by lines of buildings close to the track. While the sound of the whistle and the bell can be heard, it is difficult to determine their locality, or tell whether they come from an approaching or receding train. But the evidence here fails to show this crossing, so far as concerns danger, was in any material particular different from other crossings. The view at some points in the approach to it, as may be said of nearly all of them, is obstructed. Invariable human experience, however, as well as the evidence in the case, proves that the steam whistle of this coming train, in the open country, could be heard from a quarter to a half mile from where it was sounded. * * * The question of speed becomes material only when neither sight nor sound can avail the traveler to guard against danger."

The third, fifth, seventh, and eighth assignments are sustained, and the judgment is reversed, with a venire facias de novo.

TEAKLE v. SAN PEDRO, L. A. & S. L. R. Co.

(Supreme Court of Utah, May 9, 1907.)

[90 Pac. Rep. 402.]

Appeal—Prejudice—Exclusion of Evidence.—Plaintiff was not prejudiced by the exclusion of evidence to prove a fact already shown by other witnesses.

Same—Assignment of Error—Necessity.—The direction of a verdict for defendant cannot be reviewed on appeal where the ruling is not assigned as error.

Railroads—Persons on Track—Licensees—Care Required.*—Where, for a considerable period of time, numerous persons had been accustomed to walk along or across a railroad track in a populous city, such persons were licensees, whose presence the railroad's train operatives were bound to anticipate and observe a reasonable lookout in order to prevent injury to them, when their attention was not directed to the performance of other duties.

Same—Care of Pedestrian.†—Where a licensee was killed while walking along a railroad track, he was himself bound to observe a reasonable lookout for his own safety and exercise reasonable care, notwithstanding the duty imposed on the train operatives to observe a reasonable lookout to prevent injury to him.

Same—Contributory Negligence.‡—Where intestate stepped on a switch track in front of a moving train, when but to look or otherwise to use ordinary care would have disclosed to him the train's approach, his negligence was a contributing cause of the accident, and barred a recovery unless intestate's death would not have resulted but for defendant's negligence occurring after intestate's negligence had spent its force.

Negligence—Discovery of Peril.‡—Before a person inflicting an injury can be charged with an omission of duty in failing to discover a perilous situation of another, there must be a duty owing from him to the person in peril which had it been performed with reasonable care would have disclosed the perilous position of the person injured.

Railroads—Death of Licensee—Last Clear Chance.§—Intestate, a

*For the authorities in this series on the subject of the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Texas & P. Ry. Co. v. Modawell* (C. C. A.), 23 R. R. R. 345, 46 Am. & Eng. R. Cas., N. S., 345; *Thompson v. Cleveland, etc., Ry. Co.* (Ill.), 23 R. R. R. 233, 46 Am. & Eng. R. Cas., N. S., 233.

For the authorities in this series on the questions, who are, and are not, licensees on railroad tracks or premises, see foot-notes appended to *Keller v. Erie R. Co.* (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; foot-notes appended to *Peterson v. South & W. R. R.* (N. Car.), 22 R. R. R. 355, 45 Am. & Eng. R. Cas., N. S., 355.

†For the authorities in this series on the subject of the care required of licensees for their own safety, see foot-notes appended to *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 22 R. R. R. 360, 45 Am. & Eng. R. Cas., N. S., 360.

‡See extensive note, vol. 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

§For the authorities in this series on the question whether there

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licensee on defendant's railroad track, stepped in front of a backing train, consisting of an engine, tender, mail car, and baggage car. He was struck by the baggage car and thrown between the rails. No part of the train touched him except that a brake rod merely touched his clothing, until he was struck by the firebox of the engine, which rolled and dragged him, and when the cowcatcher passed over him he was crushed and dead. The brakeman on the end of the baggage car gave signals to the engineer to stop as soon as intestate was struck, but was unable to attract the engineer's attention, and another witness ran along the track on the fireman's side of the train, which was 184 feet long, and attempted to attract his attention, but was unable to do so. Held, that defendant, being bound to observe a lookout for licensees on the track, was also bound to provide for the exchange of signals, and that the doctrine of last clear chance was applicable, though the engineer had no actual knowledge of intestate's peril.

Same—Evidence.—Evidence as to the distance within which the train might have been stopped after intestate was struck was admissible, not only with respect to the duties owing from the engineer after he had knowledge of intestate's peril, but also with respect to the duties owing from the train operatives continuing or intervening after the commission of intestate's negligence, which, had they been performed with reasonable care, would have disclosed to the engineer the perilous situation in time to have avoided the fatality.

Appeal from District Court, Third District; before Justice T. D. Lewis.

Action by Nellie Teakle, as administratrix of the estate of Thomas W. Teakle, deceased, against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Richards, Richards & Ferry, for appellant

Whittemore & Cherrington, for respondent.

STRAUP, J. Plaintiff brought this action to recover damages for the death of her intestate, alleged to have been caused through the negligence of the defendant. The accident occurred at Salt Lake City, between First North and North Temple streets, in the railroad yard of the Oregon Short Line Railroad Company, along and over the tracks of which the defendant operated its cars. The

may be a recovery against a railroad for injuries caused by a train or car against a person, where he was guilty of contributory negligence but his peril should have been discovered by those in charge of the train or car in time to have prevented the collision, see foot-notes appended to *Texas & P. Ry. Co. v. Modawell* (C. C. A.), 23 R. R. R. 345, 46 Am. & Eng. R. Cas., N. S., 345.

For the authorities in this series on the subject of the "last clear chance" doctrine, see foot-notes appended to *Black v. New York, etc., R. Co.* (Mass.), 23 R. R. R. 44, 46 Am. & Eng. R. Cas., N. S., 44; foot-notes appended to *Hanson v. Manchester St. Ry.* (N. H.), 22 R. R. R. 675, 45 Am. & Eng. R. Cas., N. S., 675; *Reid v. Atlanta & C. Air Line Ry. Co.* (N. Car.), 22 R. R. R. 670, 45 Am. & Eng. R. Cas., N. S., 670; foot-notes appended to *Chesapeake & O. Ry. Co. v. Farrow's Adm'r* (Va.), 22 R. R. R. 360, 45 Am. & Eng. R. Cas., N. S., 360.

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yard and tracks were not inclosed, and extended in a southeasterly and northwesterly direction for several blocks, and had been traveled by numerous persons in going to and from their work and had been generally used and traveled by men, women, and children as a thoroughfare, for eight years or more without objection. While they were so being used, employees of the defendant were there and knew of such use without making any objection thereto. At the corner of First North and Fourth West streets there was a sign which read that tracks were railroad property, and trespassers were warned to keep off, but, notwithstanding the sign, the tracks and yard were continued to be used by the public generally as a thoroughfare without hinderance or objection. The tracks and yard were along thickly settled portions of the city. At about 7:40 a. m. of the 10th day of October, 1905, the deceased, who lived on First North street and west of the yard, in going toward his place of work, at a store in the business portion of the city, was walking in the yard with a companion in a southerly direction between two parallel tracks, about 13 feet apart. While the deceased was so walking along in the yard between First North and North Temple streets, the defendant, engaged in switching cars in the yard, operated a train of cars, consisting of an engine, tender, mail car, and baggage car, in a northerly direction, and on what is called the "main" track, which lay to the west of where the deceased was walking. The train was operated past him and beyond a switch, some little distance to the north of the deceased. It was then backed and moved in a southerly direction at a speed of from three to five miles an hour, and was switched from the main track to a track immediately to the east of it. The evidence is not very clear whether the deceased was walking between the main track and the track immediately east of it, or between two tracks east of the main track. However, as the train was being switched from the one track to the other, and as the baggage car, which was the first car approaching him, reached the junction of the track east of the main track and the cross switch track, the deceased, who was on the track at that place, was struck by the baggage car, and was thrown between the rails of the track and was killed. There were about six other persons walking along the tracks in the yard and in a southerly direction at the same time that the deceased and his companion were so doing. Some of them passed the deceased on the way. One of them testified that he saw the train go to the north; that he expected it to come back; that he turned around and looked for it; that, when he was on the south side of North Temple street (a short distance south of the place of the accident), he saw the deceased "on the track at the frog where a switch track crosses from the track to the west into the track on the east. When the deceased was struck, the south end of the car was still on the switch track, and had not turned to the easterly track. The engine was pointing toward the north." Another witness testified: "When I got to North Temple street I heard a yell and turned around. I saw Teakle [the deceased] immediately in front of the

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car at a point where the switch track comes from the track to the west of where he was walking into the track to the east of where he was walking. He had not changed his course when the car struck him." From this testimony it may be inferred that the deceased was walking between the main track and the track immediately east of it, and was crossing or walking on the switch track connecting these two tracks when he was struck. The brakeman, who was on the front or south end of the baggage car testified: "When I first saw these men [the deceased and his companion], they were in the open space between the cinder pit and the track [which was between the two tracks east of the main track], walking south, clear of the train on the track that we were on. They stepped over on our track about 20 feet in front of us." Either view of the evidence, however, shows that the deceased stepped on the track in front of the moving train. The morning was bright and clear, and the deceased's view of the train was wholly unobstructed. The ground was practically level, sloping slightly to the south. The train could easily have been seen by him, and he could easily have been seen by the train crew. Four witnesses, persons who were walking along the yard at the time in question, testified that they heard no whistle blown nor bell rung, nor any warning given before the collision and as the train approached, and that, had such warnings been given, they would have heard them. One witness also testified that, when the deceased was struck, he was thrown between the rails with his head to the north and his arm thrown over the east rail of the switch track, and that the witness, who was but a short distance away, "immediately ran back to where he was, and when I reached there he was still lying in the same position as he had fallen. Hadn't been moved, and his clothing was not disarranged. The set of trucks on the north of the car had not reached him. I saw this end of the car pass over him, also the car following, and the tender of the engine, during all of which time he remained in the same position and with his clothing in the same condition. I know that he was alive when I first reached him, because I saw him lower his head. In passing over him no part of the train touched him, except one brake rod, which merely touched his clothing, until he was struck by the fire box of the engine," which rolled and dragged him, and when he came out from under the cow-catcher he was crushed and doubled up, and was then dead. Several other witnesses testified to the same facts. Another witness testified that, when he reached the place where the deceased was lying, the north end of the track of the car which struck him had not yet passed over the deceased, and that the witness then ran along the track to the north a distance of three or four yards on the fireman's side of the train, hallooing that there was a man under the train and to stop; that he did not see the fireman in the cab, and could not attract his attention; and that he then returned to the place where the deceased lay. The train was about 184 feet in length. The brakeman testified that he was on the southeast corner of the baggage car, and, when the deceased stepped on the

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track, he hallooed and tried to attract his attention; that he (the brakeman) gave signals to the engineer to stop as soon as the deceased was struck; that the baggage car was on a reverse curve, which would constitute some obstruction to the engineer's view; that he gave no other signal on the car because he knew that the engineer could not see any further signals given on the car, because of the curve, and that he then jumped off the east end of the car, and ran around in front of the moving train to the west side and gave a signal on the fireman's side. He further testified "I could not get off of the car on the east to any advantage, simply because there was a cinder pit in front of me and a trestle, which were so close to the track we were on as to still have the engineer's view of me obstructed by the curve. There was no way I could have stopped the car myself. * * * I did not run north along the side of the train on the engineer's side on account of the cinder pit, which was nine or ten feet from the east rail on which the train was moving." The foregoing is a substantial statement of the evidence as shown on the part of the plaintiff. When she rested her case, the defendant also rested. At the request of the defendant the court directed a verdict in its favor. The plaintiff appeals.

During the trial the plaintiff called a witness, a Mr. Reid, who, after he had testified that he was walking in the yard about 50 feet from the accident and had seen the train approaching before it struck the deceased, was asked: "Well, now then, at any time within a minute or two before you saw this train approaching North Temple street [which was about 50 feet from the place of the accident] did you hear any whistle sounded?" This was objected to as being irrelevant, immaterial, and incompetent, and particularly for the reason that whistles and signals are intended for the use and benefit of people making a legitimate use of the highway, and not for people who are off the highway and on property belonging to the railroad company. The objection was sustained. The plaintiff also called a Mr. Ganzer, who, after testifying that he was a locomotive engineer and was familiar with the large passenger engines of the defendant, was asked if he could state within what distance a passenger engine pushing or backing a mail car and a baggage car could be stopped on a slight incline or level track; the train moving at from three to five miles an hour. This question was objected to as irrelevant, immaterial, and incompetent, and particularly for the reason that in view of the proof, it was immaterial in what distance the train could be stopped. Plaintiff's counsel stated the purpose was to show that after the deceased was knocked down the car could have been stopped within a distance of 15 or 20 feet. "The Court: Until it is apparent that the engineer saw him or knew that he was on the track there, I do not see how it is material. The objection will be sustained." Several other questions of like kind were asked the witness, and offers of proof were made that the train in question could have been stopped after the deceased was struck within 15 or 20 feet, but to each of them the court sustained objections for the same reasons heretofore stated.

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The ruling of the court directing a verdict in favor of the defendant is not assigned as error. The errors assigned relate to the rulings excluding the testimony of witnesses Reid and Ganzer. The fact sought to be shown by the witness Reid had already been shown by four or five witnesses. Assuming that it was competent and material to show the failure to give such warnings, proof of such fact was sufficiently made, without the testimony of Reid, to entitle the plaintiff to go to the jury on such question. It is not made to appear that the plaintiff was prejudiced because she was not permitted to show the failure to give the warnings by this particular witness. If the ruling of the court directing a verdict was right notwithstanding four or five witnesses testified that no bell was rung or whistle blown, it still would have been right had the witness Reid been permitted to testify to the same fact. It is manifest that it was not the ruling upon this question which resulted in the direction of the verdict. If the court erred in directing a verdict, such ruling ought to have been assigned, in order to authorize us to review it. The assignment of error is the foundation upon which rests the right of the appellate court to review the errors imputed to the trial court, and this court has repeatedly held that only such errors as are assigned will be reviewed, unless it is something which goes to the jurisdiction of the court.

The next ruling complained of is that the plaintiff was not permitted to show that the train could have been stopped within 15 or 20 feet after the deceased was discovered on the track by the brakeman, and after he was struck by the moving train. This evidence was offered, as stated by plaintiff's counsel, in support of the theory, based on the last clear chance doctrine. This assignment rests upon a foundation different from the other. The showing of this fact was essential in support of the theory. Without it, the evidence would be insufficient to support it. Its absence necessarily leads to a direction of a verdict for the defendant, if plaintiff's case depended upon the doctrine for a cause of action. If erroneous, the ruling was therefore prejudicial. This is not so because the proffered testimony was within itself sufficient to entitle the plaintiff to go to the jury, but because it was a material and essential element required to be shown in proving that the defendant had the last clear chance to avoid the consequences of the deceased's negligence. We therefore pass to a consideration of the ruling excluding this evidence.

The ruling seems to have been made on the theory that the deceased was a trespasser, and that the train operatives owed him no duty until he was discovered in a position of peril, and then only owed him the duty not to inflict a willful or wanton injury upon him; and therefore the engineer owed no duty of lookout, nor to stop the train, until he had knowledge of the peril. It undoubtedly is the general rule that train operatives owe no duty of lookout to discover a trespasser upon the track, and to such a one owe no duty until he is discovered in a position of danger. But the authorities seemingly divide on the point as to whether a person, walking

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along the track, as did the deceased, under the circumstances disclosed by the evidence, is a trespasser or stands in a relation any better than that of a trespasser; that is, whether one who walks along or crosses a railroad track at a place where for many years the general public have been accustomed to make the track a thoroughfare without objection, or by the acquiescence of the railroad company, stands in the relation of a trespasser in the sense that the train operatives owe no duty of lookout or of giving warnings when operating trains along such place. It has been held that such a person is a trespasser, and that the train operatives owe him no duty of lookout or of giving warnings, and that the only duty owing by them to him is not to wantonly or willfully injure him after he is discovered in a perilous situation. *Egan v. Montana Cent. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Glass v. Memphis & Charleston R. R. Co.*, 94 Ala. 581, 10 South. 215. Mr. Elliott, in his work on railroads (volume 3, § 1250), with considerable force urges that, whether such a person be regarded as a trespasser or a bare licensee, the duty which the train operatives owe him is the same—not to willfully or wantonly injure him, but to use reasonable care to avoid injury after his danger is discovered, that, if a person be there as a bare licensee, his license is subject to the “concomitant perils,” and that he will look out for his own safety without special warnings or change by the company in the manner of using its railroad, and that the train operatives may act on this assumption until they discover the danger.

The foregoing, of course, are not all the cases or authorities holding such doctrine, but they well illustrate the views taken by some able courts. But this court is committed to a contrary doctrine. In the case of *Young v. Clark*, 16 Utah, 42, 50 Pac. 832, it was said: Where the public in considerable numbers have been accustomed for a great length of time to use a bridge or railroad track as a footpath in populous cities or thickly settled communities, without molestation or objection from the company, and by reason of such general custom the presence of people upon such track or bridge is probable, or might reasonably be anticipated, those in control of passing trains are bound to use reasonable diligence and precaution to prevent injury to those who might be thereon, even though they were trespassers. * * * We are of the opinion that when the community, situated as this was with reference to the bridge, have for 17 years been accustomed to use the bridge as a footpath, without objection, the company is chargeable with notice of such usage and owes a duty to use reasonable care to prevent injury to persons that are liable to be crossing the same, even though they do so without authority.” In the case of *Corbett v. Oregon Short Line R. Co.*, 25 Utah, 449, 71 Pac. 1065, the trial court refused to charge, though the defendant was negligent in the operation of the engine which caused the injury, yet, if the jury found that the parents of the deceased child were guilty of negligence in permitting it to go unattended upon the railroad track, and that such negligence contributed to the injury complained of, it barred recovery, “unless you further

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find from the evidence that notwithstanding such negligence of the parents or either of them the defendant's servants, by the exercise of ordinary care, might have avoided the accident after in fact discovering the child's peril." This court held that it was not error to refuse the request, for this, among other, reasons: "That it does not correctly state the law as applied to the evidence of this case, in that it assumes that the defendant was under no obligation to anticipate persons being upon the track at this point. With an unfenced track bordered by habitations on each side, and used quite generally as a highway for both grown people and children, surely some diligence was required by defendant other than 'after in fact discovering the child's peril. * * * The instruction asked by the defendant ignored entirely the fact whether the use of the track for foot passengers was not such as to render it probable, or reasonably to be expected, that people would be upon the track at this point." The rule is well stated by the court in the case of *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361, where it is said: "At the conclusion of plaintiff's evidence, and without the production of any evidence on the part of the defendant, the court directed a verdict in favor of the defendant, which is the error complained of. This instruction was doubtless given on the theory that the child was a trespasser on the track of the railway company; that the engineer of the train, and other train operatives, on that account, owed the child no duty until they saw it; and that they were under no obligation to anticipate its presence on the track, or to be on the lookout either for it or other persons at the place where it was run over and killed. There are some adjudged cases which doubtless support such a view, but we are persuaded that it is not a correct rule, as applied to those portions of a railroad track which many people have been in the habit of using as a footpath for a considerable period, without objection on the part of the railway company, although without any express license to do so. Train operatives ought to be required to take notice of such usages and of conditions which actually exist, and to regulate their actions accordingly: A proper regard for the safety of persons and property intrusted to their charge, and in human life in general, should impel them to do so. When, therefore, for a considerable period numerous persons have been accustomed to walk across a railroad track or along a railroad track between given points, either for business or pleasure, railroad engineers should take notice of such practice, and, when approaching such places, should be required to exercise reasonable precaution to prevent injury to them. Knowing the usage which prevails, they may reasonably be required to anticipate the probable presence of persons on or near the track at such places, and to be on the lookout when their attention is not directed to the performance of their other duties." It was there held that, under the circumstances of the case, it was necessary for the jury to determine whether the engineer and fireman did in fact exercise ordinary care to discover the child. In the case of *Crawford v. Southern Pacific Ry.*

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Co., 106 Ga. 870, 33 S. E. 826, it was observed: "Admitting, for the sake of the argument, that the general rule is that a railroad company owes no duty to a trespasser who is upon or dangerously near its track in front of a moving train, until its servants have discovered its presence there, and therefore, so far as his safety is concerned, is not obliged to maintain a lookout in the direction in which the train is moving, we do not think that this could properly be held to be a uniform, fixed, and invariable rule, applicable alike to all cases and under all circumstances. Conduct which might, under one set of circumstances, show that all ordinary and reasonable care and diligence had been observed, might, under a different set of circumstances, be insufficient to show an observance of such care and diligence. We think that such a rule could mean no more than this: Taking the locality where the train is running and all the surrounding circumstances, if those in control of the movement of the train have no reason to apprehend that there may likely be a human being on the track in front of the engine, they are under no duty to one who in fact may be there, until they have actually discovered that he is there. But if, from the locality or surrounding circumstances, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then, it seems to us, it is the duty of the employees of the company to keep a lookout ahead of the train, most assuredly so unless they are performing some duty which prevents their looking out upon the track in the direction in which the train is moving." In *Sherman & Redfield on Negligence* (5th Ed.) § 484, the rule is stated as follows: "The defendant is responsible, not only for what he actually knows, but for that which he is bound to know. It is clear that the frequent statements that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'willful' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice abhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously stated it. Nothing more is really meant by the courts using these phrases than a want of ordinary care, after becoming actually aware of the plaintiff's peril. But it is much better to say so. The more frequent declaration that the defendant is not liable, unless he actually sees or knows the plaintiff's peril, are, however, equally erroneous, as too broad statements of abstract law, however proper they may have been with reference to the particular case under consideration. The rule that a plaintiff is as matter of law negligent if he fails to see what he was bound to look for and ought to have seen is rigidly enforced; and the same rule must, in common justice, be applied to the defendant. And, in fact, it actually is in almost every court where the question is squarely presented. Trainmen may justly assume that travelers will comply with the law in accordance with the general rule upon that point; but if observation has convinced them that, at certain times and places, this assumption is not borne out by the

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facts, they are not justified in acting upon it. Therefore, while trainmen are not usually bound to foresee or watch for the wrongful presence of any person upon the track, even where it is open to an adjoining highway, nor to foresee the wrongful entry of persons upon the cars, yet, if experience has shown that at certain points persons are constantly thus entering upon the track or the cars, such persons, if injured as the proximate result of the trainmen's failure to use ordinary care to keep watch for them, may recover damages if the trainmen could have seen them without difficulty, had they kept a reasonable watch, even though, in fact, they did not see them. Especially should this rule be applied where the railroad company has acquiesced in the use thus made of its property." To the same effect are the following: *Bullard v. So. Ry. Co.*, 116 Ga. 644, 43 S. E. 39; *Chamberlain v. Mo. Pac. Ry. Co.*, 133 Mo. 587, 33 S. W. 437, 34 S. W. 842; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195; *Va. Mid. R. R. Co. v. White*, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Cassida v. Or. R. & N. Co.*, 14 Or. 551, 13 Pac. 438; *Whalen v. C. & N. R. Co.*, 75 Wis. 654, 44 N. W. 849; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120; *H. & T. C. Ry. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632; *Gunn v. Ohio River R. Co.*, 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575; *Mason v. Southern Ry.*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826; *McCall v. Railroad*, 129 N. C. 298, 40 S. E. 67; *Pickett v. Railroad*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Wooster v. C., M. & St. P. R. R. Co.*, 74 Iowa, 593, 38 N. W. 425; *Conley's Adm'r v. C., N. O. & T. P. Ry. Co.*, 89 Ky. 402, 12 S. W. 764; *Hopk. Pers. Inj.* § 87; 2 *Tomp. Com. Law of Neg.* § 1726. From the authorities we are inclined to adhere to the rule already announced by this court that when for a considerable period numerous persons have been accustomed to walk across or along a railroad track in a thickly settled community or populous city, as shown by the evidence in this case, train operatives ought to be required to take notice of such usage, and to anticipate the probable presence of persons on or near the track, and to observe a reasonable lookout when their attention is not directed to the performance of other duties. On the morning in question some six or seven persons, including the deceased and his companion, were walking in the yard along the tracks in a southerly direction. They were making such use of the track as many others had made of it for a period of eight years. To require the train operatives to take notice of such usage and to regulate their actions accordingly is not unreasonable. Some duty, therefore, was imposed upon the train operatives with respect to observing a reasonable lookout in the direction of the moving train, the extent of which is not for us to say, but is to be determined by the triors of fact under all circumstances of the case.

Notwithstanding such duties imposed on the train operatives, the deceased was himself in duty bound to observe a reasonable

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lookout for his own safety, and to exercise all reasonable care commensurate with the attending dangers to avoid coming in contact with cars and trains being moved and operated in the yard. He was at a place where cars might momentarily be expected. He had an unobstructed view of the premises, and there was nothing to divert his attention or to prevent him from seeing or hearing the approach of the cars. His act of walking or stepping on the track in front of the moving train without observation, as shown by the evidence, rendered him guilty of negligence as a matter of law. We think this is true whether he was walking between the two tracks east of the main track, or between the main track and the track immediately east of it. In either event, the evidence shows that he stepped upon the switch track in front of the moving train, when but to look, or otherwise to use ordinary care on his part, would have disclosed to him the approach of the train. *Mo. Pac. Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Buelow v. C., St. P. & K. C. Ry.*, 92 Iowa, 240, 60 N. W. 617; *Balto. & O. R. R. Co. v. Schroeder*, 69 Md. 551, 16 Atl. 212. Such negligence on the part of the deceased was a concurring and contributing cause of the collision, and barred all right of recovery for whatever injury resulted therefrom, upon the principle of law that when the negligence of two persons is contemporaneous, and the fault of each operates directly to cause the injury, neither can recover from the other except for a willful or wanton infliction of the injury. If, therefore, the deceased's death was caused by the train's striking him, his contributory negligence barred recovery, for there is nothing to show that the train's striking the deceased was done willfully or wantonly. The plaintiff, however, both by her pleadings and by her evidence, sought to recover on the theory that the death of the deceased was not caused by his being struck by the train, but by the fire box of the engine, which could have been prevented by the train operatives had reasonable care been observed on their part after the commission of the deceased's negligent acts and after he was struck by the train. In order to render the defendant liable, it was therefore essential to show, as was attempted by the plaintiff, that its servants in charge of the train were guilty of a breach of duty continuing or intervening thereafter which was the proximate cause of the death. There are some authorities which hold that such breach of duty, under the doctrine of last clear chance, can only arise after the consequences of the contributory or antecedent negligence have been discovered. Hence it is urged that the engineer could not have been in fault in his failure to stop the train until he had knowledge that the deceased had been struck and was under the train. But, on an examination of the authorities so holding, it will be observed that most of such rulings were made with respect to actual trespassers or to a wanton or willful infliction of an injury, and, as is said by *Shearman and Redfield*, at section 484, "we think that the courts which still adhere to the doctrine which confines liability to cases of actual knowledge of

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peril only apply it to trespassers and not to mere instances of negligence on the part of the plaintiff not trespassing." In 55 L. R. A. 418 may be found an extensive discussion of the doctrine of "last clear chance," and where many cases from nearly all the states are collected and reviewed. They are summarized by the compiler on page 465 as follows: "The foregoing review of the authorities, while disclosing much difference of opinion with reference to the ultimate question as to the defendant's liability to one guilty of negligence, under a given set of facts and circumstances, seems nevertheless, when proper distinctions are observed, to show a decided tendency on the part of the courts to apply the doctrine of 'last clear chance' to any omission of duty on the part of the defendant, whether before or after discovering the peril in which the plaintiff or deceased had placed himself, or his property, by his antecedent negligence, if that breach of duty intervened or continued after the negligence of the other party had ceased." This court, in harmony with the great weight of authority, seems to be committed to the rule (when the injured or deceased person was not a trespasser) that the defendant's act of negligence will be regarded as the sole proximate cause of the injury, not only when relating to a breach of duty occurring after the consequences of contributory negligence have been discovered, but also when, in the exercise of ordinary care, such consequences could have been discovered, if a breach of duty intervened or continued after the commission of the contributory negligence. While the breach of duty must be subsequent to the commission of the contributory negligence, yet such breach of duty may be before, as well as after, the discovery of the peril. This principle of law has often been illustrated by cases where the owner of stock was guilty of negligence in permitting it to stray upon the railroad track, and where the liability of the company was made to depend, not only upon the question of whether the train operatives could have avoided the injury after the animal was discovered on or near the track, but also whether, in the exercise of ordinary care, the train operatives could or ought to have discovered it in time to have avoided the injury. So also in cases where one was guilty of negligence in the first instance in going upon the track and by reason of being caught in a frog, or was otherwise rendered unable to escape, and where the railroad company was held liable, not only for an omission of duty on the part of the train operatives after discovering the peril, but also for an omission of duty in not discovering it. In such cases the contributory negligence is deemed the remote, and the defendant's negligence the proximate, cause of the injury. Such is the principle of law which seems to have been announced by this court in the case of *Hall v. Railway Co.*, 13 Utah, 243, 44 Pac. 1046, 57 Am. St. Rep. 726, and in the case of *Shaw v. City R. R. Co.*, 21 Utah, 77, 59 Pac. 552, and is the principle of law stated in the instruction which this court approved, and which was involved in the question decided by the court, in the case of *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 52 Pac. 92, 40 L. R. A. 172,

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67 Am. St. Rep. 621, and is well illustrated in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 557, 11 Sup. Ct. 653, 35 L. Ed. 270, and in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

There is much reason for the distinction that the railroad company should not be held liable in case of an actual or conscious trespasser until this position of danger is discovered, and should be held liable in case of one not a trespasser exposed to peril through negligence, not only after the consequences of such negligence have been discovered, but which ordinarily could have been discovered, if there was a breach of duty continuing or intervening after the commission of the contributory negligence. In the one instance the train operatives were not called upon to expect or anticipate the trespass or the presence of persons, and hence owed no duty of lookout or of giving warnings. In such case no duty was imposed on them until the trespasser was discovered in a position of peril. In such case the liability of the company must solely depend upon a breach of duty subsequent to the discovery. If, on the other hand, through a long usage or custom the public has made a thoroughfare of the track in a populous city or thickly settled community though not with any express authority but under circumstances of an implied license, the train operatives are required to reasonably expect and anticipate the probable presence of persons on or near the track at such place, and there is consequently imposed on the train operatives a duty toward such persons of a reasonable lookout. When, therefore, it is said that the railway company is liable in such case for an omission of duty on the part of the train operatives, not only after the consequences of the injured or deceased's negligence have been discovered, but also for such an omission of duty, as, had it been reasonably preformed, such consequences could ordinarily have been discovered, it necessarily implies the existence of a duty owing by the train operatives toward the injured or deceased person before as well as after the commission of the contributory negligence. In other words, before a person inflicting an injury can be charged with an omission of duty in failing to discover a perilous situation of another, there must be a duty owing from him to the injured or deceased person, which, had it been performed with reasonable care, would have disclosed to him the exposed situation of the person receiving the injury. "If this test," says Mr. Thompson in his *Commentaries on the Law of Negligence* (volume 1, § 232), "is kept steadily in view, it will lead us out of many difficulties and prevent much confusion." The duty which the train operatives owed the deceased of observing a reasonable lookout existed before he was struck by the train as well as thereafter. The proffered evidence should therefore be considered, not only with respect to duties owing from the engineer after he had knowledge of the deceased's exposed peril, but also with respect to duties owing from the train operatives continuing or intervening after the commission of the deceased's negligence, which, had they been performed with

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reasonable care on their part, would have disclosed to the engineer the peril of the situation in time sufficient to have avoided the fatality. The purpose of the position of the brakeman on the front of the baggage car, among others, was evidently to better observe a lookout and to apprise the operatives on the engine of any impending danger. The duty of the former was not only to observe such reasonable lookout, but to use all reasonable care and efforts to make known to the latter any situation of danger discovered by him. There likewise was a corresponding duty imposed on the operatives of the engine to maintain a reasonable lookout for the signals of the brakeman. Not to do so rendered the position of the brakeman as a watchman to a large extent useless. Whether an observance of these duties would result in averting the fatality would naturally depend in part upon the time the operatives of the train had in which to stop it, and, conversely, the time required for or distance in which the train could have been stopped, directly bear upon the question of the performance or nonperformance of those duties. The question as to the sufficiency of the evidence to show a breach of duty or negligence on the part of the brakeman, or the operatives on the engine, is not now before us. When the deceased was struck by the train and rendered helpless, the effect of his antecedent or contributory negligence was spent. Plaintiff then had the right to show if she could, a breach of duty on the part of the train operatives intervening or continuing thereafter which was the proximate cause of the death. The door should not have been closed barring her from introducing any competent and material evidence in support of it. The fact offered to be proved was not only material, but was an essential, in establishing the ultimate fact that the train operatives, in the exercise of ordinary care, could have avoided the consequences of the deceased's negligence. For, whatever omission of other duties might have been shown, if the train, in the exercise of ordinary care, could not have been stopped within such a distance as would have avoided the fatality, no liability would have been on the part of the defendant under the doctrine of last clear chance. Whether the plaintiff would have been entitled to go to the jury if the fact had been proven is likewise not before us. The questions presented to us for decision, and which we are called upon to decide are: Was the evidence competent and material? And was it erroneously excluded to plaintiff's prejudice? From the foregoing it is manifest that both questions must be answered in the affirmative.

The judgment of the court below is therefore reversed, and a new trial granted, with costs to the appellant.

McCARTY, C. J., and FRICK, J., concur.

ST. LOUIS SOUTHWESTERN RY. CO. *v.* HEINTZ.

(Supreme Court of Arkansas, April 29, 1907.)

[102 S. W. Rep. 221.]

Railroads—Operation—Injury to Animals on Track—Evidence—Sufficiency.—Evidence in an action against a railroad company, operating on tracks used jointly with another company, for the killing of a horse, considered, and held insufficient to sustain a verdict imposing the fault for the injury on defendant's train.

Same—Presumption—Res Ipsa Loquitur.*—In an action for the killing of a horse, alleged to be caused by the operation of a railroad train running by permission over the tracks of another railroad, no presumption of negligence as against the licensee railroad arises from the fact that a horse was found injured near the track.

Appeal from Circuit Court, Crittenden County; Frank Smith, Judge.

Action by L. F. Heintz against the St. Louis Southwestern Railway Company for the negligent killing of a horse. From a judgment for plaintiff, defendant appeals. Reversed.

S. H. West and *J. C. Hawthorne*, for appellant.

L. P. Berry and *A. B. Shafer*, for appellee.

MCCULLOCH, J. This is an action against the St. Louis Southwestern Railway Company to recover the value of a horse alleged to have been negligently killed by the defendant in the operation of its trains. The horse was killed by a train near Ebony, a station on the road of the St. Louis, Iron Mountain & Southern Railway Company, in Crittenden county, a few miles east of the railroad bridge which crosses the Mississippi river at Memphis, Tenn. Appellant operated one train each way per day over said road; the train going to Memphis being due at that place at 6:20 o'clock in the forenoon. It is alleged that the horse was killed by this train. This is denied by appellant, and the only question raised here is whether there is sufficient evidence to sustain the finding of the jury that the horse was killed by appellant's train.

The engineer testified positively that the horse was not killed by his train, and that he saw the horse lying near the track when his train passed that morning. An Iron Mountain train was due to reach Memphis at 6:45 a. m.; and appellant's train was late on this particular day, and did not reach Memphis until 7:05 o'clock. The witnesses introduced by plaintiff do not identify appellant's train as the one which killed the horse, and the jury were not

*See foot-notes appended to *Central of Georgia Ry. Co. v. Turner* (Ala.), 22 R. R. R. 661, 45 Am. & Eng. R. Cas., N. S., 661; foot-notes appended to *St. Louis S. W. Ry. Co. v. Hutchison* (Ark.), 21 R. R. R. 625, 44 Am. & Eng. R. Cas., N. S., 625; foot-notes appended to *Mobile & O. R. Co. v. Morrow* (Ky.), 21 R. R. R. 644, 44 Am. & Eng. R. Cas., N. S., 644.

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warranted in inferring that the horse was killed by this train. The witness who saw the train when it struck the horse said that she thought it was the Cotton Belt train (meaning appellant's train); but, on being interrogated further, she said that her only means of identifying it was that the train did not stop at the station. Neither her testimony nor that of any other witness furnished any means of identification in that way, as it nowhere appears that the Iron Mountain train, due about the same time, stopped at the station. Another witness, who saw the horse shortly after it was injured, said that it must have been done by the Cotton Belt train, as it was too early in the morning for the Iron Mountain train; but, on cross-examination, he admitted that he did not know when the Iron Mountain train was due.

According to proof that the Cotton Belt train was delayed on that morning, it must have passed Ebony about the time the Iron Mountain train was due. The witness did not pretend to state the precise hour when the injury occurred, but said it was about 6 o'clock, or a little later. It is not at all improbable from their testimony that it was an Iron Mountain train which struck the horse, as both trains passed along near the same time. Appellant's engineer testified positively that his engine did not strike the horse. No presumption of negligence arises against appellant from the fact that the horse was found injured near the track, as it was not appellant's railroad. It merely operated a train over it by the permission of the company which owned and operated the road. Under the state of the testimony, the verdict is unsupported and cannot be permitted to stand. The plaintiff must, in order to recover, bring forward some proof that the horse was killed by appellant's train. He must in some way identify the Cotton Belt train as the one which struck his horse. He has not done this, and the verdict must be set aside.

Reversed, and remanded for a new trial.

SHAFFER *v.* LEHIGH VALLEY R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey, June 17, 1907.)

[66 Atl. Rep. 1072.]

Railroads—Accident at Crossing—Open Gates.*—While open gates are an invitation to cross, they do not excuse a traveler approaching a railway crossing from looking or listening, or both, where either would be effective.

(Syllabus by the Court.)

Action by Oscar W. Shafer against the Lehigh Valley Railroad Company. Verdict for plaintiff. Rule to show cause discharged, unless plaintiff remits portion of damages recovered.

Argued February term, 1907, before FORT, HENDRICKSON, and PITNEY, JJ.

H. B. Herr and *Smith & Gray*, for the rule.

William C. Gebhard, opposed.

FORT, J. In this case but two questions are argued on the brief as grounds for a new trial; the first being the refusal of the court to nonsuit. We think that this refusal was right.

At the point where the plaintiff was injured there were seven tracks at grade. On either side of the roadway there were gates. Those gates were operated by a man in the tower. The plaintiff was a baker, and on the morning in question was crossing the tracks in his baker wagon, and as he approached the tracks the gates were up. Three of the tracks at the side of the railway from which the plaintiff approached were sidings. The two tracks on the opposite side of the roadway were the main tracks. Upon the sidings there were standing cars to obstruct the view of the plaintiff from the direction from which the train that hit him came. The train was going rapidly, concededly at the rate of 35 to 40 miles an hour, probably faster. There were also distracting dangers at the crossing at the time the plaintiff was going over, consisting of a drill engine switching or handling cars but a short distance away and which the plaintiff was observing. Open gates are an invitation to cross. Although they do not excuse a failure on the part of the traveler either to look or listen, yet open gates under such circumstances are clearly evidence of the negligence of the agents of the defendant company, and, whether the plaintiff exercised reasonable care and prudence, or that care and prudence which was required of him under the circumstances surrounding him, was a question for the jury. So, in any view, the court rightly refused to nonsuit.

*See foot-notes appended to *Koch v. Southern Cal. Ry. Co.* (Cal.), 22 R. R. R. 615, 45 Am. & Eng. R. Cas., N. S., 615; foot-notes appended to *Messenger v. Pennsylvania R. Co.* (Pa.), 21 R. R. R. 86, 44 Am. & Eng. R. Cas., N. S., 86; *Briggs v. Boston & M. R. R.* (Mass.), 19 R. R. R. 508, 42 Am. & Eng. R. Cas., N. S., 508.

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The other ground urged for a new trial is the suggestion that the damages were excessive. The verdict was for \$18,000. We think the damages were excessive. The plaintiff was seriously injured undoubtedly, but whether the serious character of the injury, which still exists, is to obtain for all the life of the plaintiff, is not clear. The earning capacity of the plaintiff was much more than capitalized by the verdict.

This disposition will be made of this case: The rule to show cause will be discharged, unless the plaintiff will consent to remit all damages recovered in excess of \$10,000, and, upon the further condition that, if the plaintiff does not consent to thus remit and to this reduction, the defendant may have a new trial upon the condition that it concede liability in the case and consent to go to trial upon the question of the quantum of damages only.

BICKEL v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, April 1, 1907.)

[66 Atl. Rep. 756.]

Railroads—Accident at Crossing—Defenses.*—Where a traveler was injured at a crossing, it is not a conclusive answer for the railroad to say that the bell was rung or the whistle sounded, unless it appears that under the circumstances the signal was sufficient to give timely notice to travelers approaching on the highway.

Same—Questions for Jury.—In an action for injuries at a crossing which the person injured was approaching with restive horses, it is for the jury to determine whether the railroad company gave proper signals at a point where the driver would have heard them in time to save himself from being placed in a dangerous position.

Appeal from Court of Common Pleas, Berks County.

Action by Angeline F. Bickel against the Pennsylvania Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Cyrus G. Derr, for appellant.

Isaac Heister, for appellee.

MESTREZAT, J. This is an action of trespass brought by the

*See foot-notes appended to *Cleveland, etc., Ry. Co. v. Miles* (Ind.), 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536; *Reed v. Queen Anne's R. Co.* (Del. Sup'r Ct.), 11 R. R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332; *Louisville & N. R. Co. v. Sawyer* (Tenn.), 16 R. R. R. 800, 39 Am. & Eng. R. Cas., N. S., 800; foot-notes appended to *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739; *Bamberg v. Atlantic Coast Line R. Co.* (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20.

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plaintiff to recover damages for the death of her husband, who was killed by a collision with the defendant company's train at a grade crossing. In a charge, exceptionally clear and concededly adequate, the learned trial judge submitted the question of the defendant's negligence and the deceased's contributory negligence to the jury, who returned a verdict for the plaintiff. A formal motion for a new trial was made, but not pressed, and the learned counsel for the defendant company took a rule upon the plaintiff to show cause why judgment non obstante veredicto should not be entered for the defendant under the act of April 22, 1905 (P. L. 286). In an exhaustive opinion by the trial judge, he has reviewed at length the facts, as well as the law applicable to the case, and has conclusively demonstrated that there was sufficient evidence to justify the court in submitting the case to the jury. The authorities cited amply sustain his view of the law, and the testimony to which he refers clearly shows that the case could not have been withdrawn from the jury on either of the two questions submitted for their consideration. The defendant company has therefore had its case considered twice by an able and thoroughly competent court, who heard the testimony and who dealt with every question which now appears upon this record. So satisfactory to the defendant's counsel was the case disposed of in the court below that the single complaint in this court is that the trial court erred in not directing a verdict for the defendant, and subsequently, in not entering judgment for the defendant notwithstanding the verdict.

Under the testimony in the case, the defendant's negligence was clearly a question of fact for the jury. And it was made to turn upon the question whether the whistle was blown at the whistle post and the fireman rang the bell for the crossing at which the deceased was killed. The court, on request of the defendant's counsel, instructed the jury that "if the defendant's engineman sounded the whistle at the whistle post, and the fireman rang the bell thence to the crossing at which the accident happened, the verdict must be for the defendant." In affirming that point the learned court surely gave the defendant company all it was entitled to under the facts of the case. Notwithstanding the topography of the country, the character of the crossing, and the obstructed view which the deceased had of the approaching train, the learned judge told the jury that the defendant company was relieved from liability if it blew the whistle at the post and rang the bell until the crossing was reached. Under the submission the verdict establishes the fact that the engineer failed to give the signal at the whistle post which, by making a rule requiring it, the defendant company shows that it regarded the signal at that place as necessary to protect the public who had occasion to use the crossing. The learned counsel for the defendant company contends that the testimony of its witnesses shows conclusively that the signal was given at the whistle post, but we think the trial court's analysis of it clearly discloses that the engineer is the only witness who testifies positively that the signal was given. The

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testimony of the defendant's other witnesses is clearly open to the doubt and uncertainty which the trial judge points out in his opinion. We think the contradictions of the engineer warranted the jury in disregarding his testimony entirely on that point. Material parts of it are flatly contradicted by other witnesses who were corroborated by certain uncontroverted facts in the case. For the trial court under these circumstances to have instructed the jury that they should believe the testimony of the engineer and disregard all the other testimony in the case as to whether the signal was given at the post or not would have been manifest error. As we have said, an analysis of all the testimony on this point, of the defendant as well as of the plaintiff, shows that the question was undoubtedly for the jury.

The learned judge, as we have seen, gave the jury positive instructions that, if the whistle was sounded at the whistle post and the fireman rang the bell thence to the crossing, the defendant's employees had done their duty, and the defendant company was relieved from liability for the death of the plaintiff's husband. The learned court might have gone further and told the jury broadly that it was the duty of the defendant's employees in charge of the train to have given timely and sufficient warning of its approach to the crossing in view of the circumstances of the case, such as the character of the crossing, the ability of travelers to see an approaching train, the rate of speed of the train, etc., and that, failing to do so, the plaintiff, in the absence of negligence on the part of the deceased, was entitled to recover. While the law does not point out any particular mode or manner in which notice of trains approaching a crossing shall be given, it does require that some suitable and adequate means, adapted to the circumstances, shall be adopted and applied. *Sterrett, J., in Philadelphia & Reading Railroad Co. v. Killips*, 88 Pa. 405. In *Ellis v. Lake Shore, etc., Railway Co.*, 138 Pa. 506, 21 Atl. 140, the defendant company submitted several points for instruction; its first point, which was negatived by the trial court, being as follows: "If the jury find from the evidence in this case that the engineer of the defendant company sounded the whistle at a proper distance, and rang the bell as they approached the road crossing, then the defendants have done their whole duty, and are guilty of no negligence, and there can be no recovery in this case." In sustaining this ruling, this court said (page 519 of 138 Pa., page 142 of 21 Atl.): "We do not think it was error to decline to affirm the defendant's first point. The vice of the point is that it assumed that the railroad company had performed its whole duty, provided the whistle was sounded and the bell rung at a proper distance from the crossing. But there was another element in the case which the jury were necessarily compelled to pass upon, viz., the rate of speed at which the train approached the crossing. The character of the crossing itself was a circumstance which could not be ignored, and which necessarily affected the relative duties of both the plaintiff and the company. If it was a dangerous crossing, as was practically admitted on both

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sides, it was the duty of the plaintiff to exercise the more care in approaching it. At the same time it was equally the duty of the defendant company to see that their trains passed at a reasonable rate of speed, proportioned to the danger. In other words, negligence is the absence of care according to the circumstances, and must be measured by the apparent danger." In *Childs v. Pennsylvania Railroad Co.*, 150 Pa. 73, 24 Atl. 341, the court discusses the rate of speed at which a railroad may run its trains in the open country, and its duty to give signals in approaching a crossing. It is there said (page 77 of 150 Pa., page 342 of 24 Atl.): "While railroad companies may move their trains at such rate of speed as the character of their machinery and roadbed may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty." After referring to the facts of the case, the court continues: "The question suggested by these facts is whether, at such a crossing, and with such a rate of speed, the bell can be heard far enough to be a proper method of giving warning. If it could be heard a quarter of a mile away, it would afford a trifle more than a quarter of a minute for the traveler to determine what to do, and to do it. If the whistle could be heard twice or three times as far, the time afforded the traveler to escape from danger would be twice or three times as great. If, for want of a few additional seconds of time, which another mode of giving warning would have afforded, property or life be destroyed, is it not for the jury to say whether or not the longer warning ought, under the circumstances, to have been given?" In concluding the opinion, the learned judge says (page 78 of 150 Pa., page 342 of 24 Atl.): "We think there was one question clearly raised by the testimony which was exclusively for the jury, viz., whether a train approaching a crossing, situated like that at Dark Run Lane, at a high rate of speed, can give sufficient notice of its approach by ringing a bell? If they should find the fact to be that a train moving at the rate of speed at which this train was running would cover the distance between a point from which its bell could be heard at the crossing and the place of crossing in so short a time to make the signal of little or no use to one in the act of crossing the track, then the failure to give notice by the whistle from a longer distance away would be negligence."

From these and other cases the rule is established that it is the duty of the employees of a train approaching a crossing to give such signal as will protect the traveler if he is in the exercise of ordinary care. It is not a conclusive answer for a railroad company to say that the bell was rung or the whistle was sounded in reply to a charge that a train negligently approached a grade crossing unless it appears that under the circumstances of the case such signal was sufficient to give timely notice to travelers who were approaching the crossing on the highway. At such crossing the duties of the company and of the traveler are reciprocal. Each must approach the crossing with a due regard for the rights of

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the other, and, when either fails to observe the care required, it is negligence for which the guilty party is responsible. Either party will only be absolved from the charge of negligence if he has done what the circumstances of that particular case required a prudent man to do.

The question of the contributory negligence of the deceased was likewise for the jury. Here, again, we are met with the testimony of the engineer, but again we are compelled to suggest that his veracity was on trial and was a question for the decision of the jury. "Falsus in uno, falsus in omnibus," is a maxim which applies to the testimony of the engineer. The testimony of some of the other witnesses is wholly irreconcilable with that of the engineer; and hence the duty imposed upon the jury to say whether or not he was mistaken as to the conduct of the deceased and his son when they approached the fatal crossing. In the absence of a similar experience, we cannot determine what our conduct would be if we were within a few yards of a grade crossing with a team of skittish horses and an approaching train sounding shrill blasts from its whistle was discovered turning a curve about 700 feet distant and traveling towards us at the rate of 45 miles an hour. Whether we would back the horses, turn them to one side, or attempt to cross the track, or could control the team at all few men can tell until they are subjected to the perils of such a situation. A judge in his chambers or a lawyer in his office without the experience may surmise what he would do or what another ought to do under those circumstances, but it would simply be a guess on his part, lacking the confirmation of a practical test, and hence without the weight and deference due the finding of 12 intelligent men whose experience in the everyday affairs of life fit them more certainly to judge of what a prudent man would do under such circumstances. Here the deceased and his son were traveling on a highway almost parallel with the railroad and with their view of an approaching train obstructed by buildings, trees, etc., until they were within about 60 or 70 feet of the crossing, when they could see a train for a distance of about 750 feet. The crossing was approached on a highway about 12 feet wide and of ascending grade. Sixty-seven feet distant from the crossing was a branch of the Reading Railroad which the travelers were required to cross before they reached the defendant's road. The train was traveling at a speed of at least 45 miles an hour, which would have required possibly about 10 seconds for it to have run 750 feet from the place where it could first have been seen by the deceased to the crossing where it struck him. Conceding that the Reading Road was seldom used, yet his duty required the deceased not to stop upon it, and hence he was within less than 67 feet from the crossing, and had not more than 10 seconds "to determine what to do, and to do it." What a prudent man ought to do under those circumstances was clearly for the jury to say. If a proper signal had been given at the whistle post 1,387 feet away, the chances are that the deceased and his son would have heard it, and that they would not have been placed in this most dangerous

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position. In determining the duty of the deceased at this time, regard must be had not only to his own conduct, but that of the defendant company. As said in *Bard v. Philadelphia & Reading Railway Co.* 199 Pa. 94, 48 Atl. 684: "In determining the negligence of a plaintiff in a case of this character, it is often necessary to consider not only his conduct on the occasion, but also that of the defendant. This was at the crossing of a street where both parties had a right to be. Each party had also the right to act with the belief that the other would exercise his right at the place in the manner and way his duty required him to do. * * * The plaintiff was justified in believing that the defendant's employees would preform their duty in this respect (observe the care required in approaching a grade crossing), and he could act on such belief without any imputation of negligence." The exact distance of the deceased from the crossing at the time he discovered the approaching train is not shown, but he must have been very nearly committed to the act of crossing, because his horses were across the defendant company's tracks when the engine struck the wagon "right opposite the seat." Considering the delay caused by the unruly conduct of his horses, as disclosed by the engineer's testimony, the deceased would have had no difficulty in passing the crossing in safety, had not the rapid approach of the train and the two shrill blasts from the whistle frightened the horses and made them unmanageable. To a horse unaccustomed to a steam whistle, there is nothing that will frighten it more than the successive blasts of the whistle of a locomotive in the near vicinity. When, therefore, we consider the character of this crossing, the conduct of the defendant company's employees, and the position of the deceased at the moment of his first warning of the approaching train, it is clear that the nature of his conduct on the occasion, whether negligent or otherwise, was under all the circumstances a question for the jury. It unquestionably was his duty to stop, look, and listen for an approaching train at a proper place, and to continue to observe due care to prevent a collision until he had passed entirely beyond the company's track, yet the law presumes, in the absence of evidence to the contrary, that this duty was performed. The credibility of the engineer, as well as that of all the other witnesses, was for the jury, and the testimony being sufficient, the learned judge committed no error in submitting the case.

The assignment of error is overruled, and the judgment of the court below is affirmed.

KLINE v. SANTA BARBARA CONSOL. RY. CO.

(Supreme Court of California, April 2, 1907.)

[90 Pac. Rep. 125.]

Carriers—Carriage of Passengers—Care Required of Carrier.*—A common carrier of passengers must exercise the utmost care, diligence, and foresight of a very cautious person, and is responsible for any injury to a passenger except that occasioned by inevitable casualty or some other cause which human foresight could not prevent.

Damages—Elements of Damages—Injuries to Person.—Where a person injured in a street car accident was rendered to some extent unable to care for herself, and her injury necessitated the hiring of somebody to care for her, such result was an element to be considered in assessing her damages.

Appeal—Review—Harmless Error—Evidence Inadmissible under Pleadings.—The introduction of evidence in a personal injury case as to the extent and permanence of plaintiff's injuries, although inadmissible under the pleadings, was harmless error where the plaintiff had submitted before the trial to a physical examination by surgeons selected by the defendant to ascertain what her injuries were, since the evidence could not have operated as a surprise.

Same—Motion to Strike Out—Refusal.—The error in refusing to strike out an opinion of a witness, in a suit for injuries caused by a street car, that the car was moving at "an unpardonable high rate of speed," was not prejudicial where it was conceded that the car had escaped all control and had descended a grade at a dangerous rate of speed.

Evidence—Subjects of Expert Testimony—Matters of Common Knowledge.—It does not require an expert to testify as to the suffering of an injured person, but the testimony of any one of ordinary intelligence and experience is competent.

Appeal—Review—Excluding Proper Evidence—Harmless Error.—The improper rejecting of hypothetical questions was harmless error where, by a mere change in the form of the questions, all the evidence sought to be obtained by the rejected questions was introduced.

In Bank. Appeal from Superior Court, Santa Barbara County, Felix W. Ewing, Judge.

Action by Clemence Kline against the Santa Barbara Consolidated Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Trowbridge and Henley C. Booth, for appellant.

W. S. Day and John J. Squier, for respondent.

*See foot-notes appended to *Atchison, etc., Ry. Co. v. Calhoun* (Okl.), 22 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791; foot-notes appended to *Raymond v. Portland R. Co.* (Me.), 22 R. R. R. 476, 45 Am. & Eng. R. Cas., N. S., 476.

Kline v. Santa Barbara Consol. Ry. Co

BEATTY, C. J. On July 26, 1903, the defendant, a street railway corporation engaged in operating electric cars in the city of Santa Barbara, received the plaintiff, a woman 65 years of age, as a passenger in one of its cars at the terminus of the line immediately in front of the old Franciscan Mission in said city. When the plaintiff boarded the car, she seated herself on one of the rear outside seats, which was long enough to seat three persons comfortably, and which ran parallel with the axis of the car. Immediately in front of her was a standard carrying a handrail, and extending from the side steps of the car to the roof. After the car had been under way a few yards it gained speed despite the fact that the motorman and conductor applied the brakes, which were of the hand-lever pattern, and when the car—the speed having become greatly accelerated—reached a curve 974 feet from the mission, the lurch of the car in rounding the curve threw the plaintiff from her seat to the ground, causing the injuries for which this action was brought. The action was defended upon two grounds: First. That the loss of control of the car was due to the fact that the county of Santa Barbara shortly before the date of the accident, in applying crude oil to the roadway, had left a puddle of oil at the extreme end of the track, which had become covered with dust; that the car on which plaintiff became a passenger, being an excursion car, was run out to the end of the track to avoid interruption to the regular cars; and that thereby, without the knowledge of defendant, its officers, or the car crew, its wheels and brake blocks had become saturated with oil, and useless as a means of controlling the car on the down grade from the mission to the curve. Second. That the plaintiff was warned of the situation in time to have secured herself from any danger of being thrown off the car by simply grasping the standard post in front of her, and that, having neglected this precaution, she was guilty of contributory negligence. In mitigation of damages the defendant offered to prove that the injuries resulting from the accident would have been much less serious if the plaintiff had been properly treated by the surgeon employed by her. The case was tried by jury and a verdict returned in favor of plaintiff for \$8,000. Defendant appeals from the judgment. The record here includes a bill of exceptions embodying the evidence, and the exceptions taken at the trial to the rulings of the court upon objections to evidence, and in giving and refusing requests to charge.

The cause was originally transferred for hearing to the District Court of Appeal, where the judgment of the superior court was affirmed. Upon petition of appellant it was ordered to a rehearing in this court, principally for the purpose of giving further consideration to the questions raised as to the correctness of two instructions given to the jury by the trial judge, and approved by the District Court of Appeal. Besides these questions, counsel for appellant insisted at the rehearing, as they did in their petition, upon further consideration of some of their assignments of error, not expressly dealt with in the opinion of the district court of appeal. The most important of these questions in its

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bearing upon this case, and upon other cases likely to arise in which it will be invoked as a precedent, relates to the degree of care required to be exercised by common carriers of passengers, and the duty imposed upon such carriers in the exercise of that care.

In submitting the case to the jury the judge of the superior court gave, among others, the following instruction: "Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent." The objection to this instruction is directed to the words: "Occasioned by inevitable casualty or some other cause which human foresight could not prevent." This is construed by counsel as requiring a degree of care which would be the utmost that the human mind is capable of imagining, and such they contend is not the law. But, whatever the instruction may be held to mean, it cannot be denied that this court, in a number of instances, has approved it as a correct statement of the law, so that either counsel are mistaken in their construction, or the rule of law is as stringent as their construction makes it. As long ago as 1859 in deciding the case of *Fairchild v. California Stage Co.*, 13 Cal. 604, Justice Baldwin, delivering the opinion of the court, quoted with entire approval the unanimous decision of the Virginia Court of Appeals that "passenger carriers bind themselves to carry safely those whom they admit into their coaches, as far as human care and foresight will go—that is, for the utmost care and diligence of very cautious persons—and, of course, they are responsible for any, even the slightest, neglect"; citing Story on Bailments, §§ 601, 601a, where that author uses this language: "And the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent."

This decision has since been approved and followed in several other similar cases, and as to the point under consideration remains unquestioned. In substance the rule there affirmed has been made statute law in section 2100 of the Civil Code, which requires of the carrier of passengers the use of the "utmost care and diligence." And this as appears from the passage quoted from the Virginia case (*Farish v. Reigle*, 11 Grat. 711, 62 Am. Dec. 666), and approved by this court, is construed to mean all the care which human foresight will suggest. In another case which was decided before the adoption of the Civil Code, this court cited

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section 601 of Story on Bailments as authority for the rule that "carriers of passengers bind themselves to carry safely those whom they take into their coaches or cars as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons." *Wheaton v. N. B. & M. R. R. Co.*, 36 Cal. 593. And in that case, the court, after stating the rule proceeded to explain it as follows: "Whether in case of injury they have exercised such care and diligence is to be determined in view of the facts and circumstances which existed prior to the accident, and they cannot be held not to have done so because, after the accident, it may appear that it could have been avoided by precaution which a very cautious person, not knowing that the accident was about to occur, would not have taken. But this form of expressing the rule is not more clear than the bare statement that the carrier must exercise the utmost care, diligence and foresight of a very cautious person." These extracts from the opinions of this court in a stagecoach case, and a street railway case, decided before the adoption of our Civil Code, show that the language of instruction 7 given in this case had not only been approved as a correct statement of the rule of law, but had been explained and construed as the equivalent and no more than the equivalent of the rule enacted in section 2100 of that Code. It cannot be error, therefore, for a trial court, in submitting a case of this kind to the jury, to state the rule in its approved form, and, if counsel have reason to fear that the jury may understand the rule so expressed as requiring more than the utmost caution of very cautious persons, in view of the circumstances known or imputed to the knowledge of the carrier before the accident, they have the right to propose an instruction embodying the proper qualification. Other cases decided since the adoption of the Code rule are in perfect accord with those previously decided. See *Jamison v. S. J. & S. Co.*, 55 Cal. 593. In *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, there is a very full review of the authorities on this point, citing not only Story on Bailments, but Cooley on Torts, and a large number of decisions of courts in other jurisdictions, all supporting the rule in terms or substance, as it was given in this case. It was approved in terms in *Mitchell v. S. P. R. R. Co.*, 87 Cal. 64, 75, 25 Pac. 245, 11 L. R. A. 130, and in the very recent case of *Boone v. Oakland Traction Co.*, 139 Cal. 494, 73 Pac. 243. Counsel contends that what was said in the two cases last cited was dictum, because the judgments against the carriers were reversed on other grounds. But it was not dictum—the point was involved in each case, and was certain to arise on the new trial which was ordered. It was therefore a point to be decided, and, being decided, became in each instance the law of the case. Instructions couched in terms similar to those in question may have been disapproved in other jurisdictions, but here the form in which the rule was stated has been so often approved, and the means of preventing its misconstruction or misapplication are so entirely within the power of the defense in actions for damages that this

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court could not with any consistency or justice set aside its previous rulings in this class of cases. The propriety of this conclusion could not be more clearly illustrated than it is by the fact that in this case counsel for the defendant asked, and the court gave, the following instruction to the jury: "(5) You are instructed that, while a street railway company does not insure the absolute safety of its passengers, it is the duty of the street railway company, and was the duty of the defendant in this case, to do all that human care, vigilance, and foresight could, under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers; and you are instructed that if the injury to the plaintiff was caused solely by the brakes not working and the reason of the brakes not working was oil on the track, and that the defendant did not know that such oil was on the track at the time of the accident and should not have known in the exercise of such care, vigilance, and foresight, then the injury to the plaintiff was caused by a mere accident for which the defendant is not responsible and your verdict should be for the defendant." From which it appears that so far from questioning the rule at the trial counsel for the defendant requested the court to give it in the very words complained of, with an explanation which freed it completely from the construction which they say renders it erroneous.

The following is the eighth instruction, given to the jury at the request of the plaintiff: "(8) If the plaintiff is entitled to recover, the measure of her recovery is what is denominated compensatory damages; that is, such sum as will compensate her for any injury she has sustained. The elements entering into such damages are the following: (1) Such sum as will compensate her for the expenses, if any, she has incurred in caring for and nursing herself during any period she was disabled by the injury, not exceeding the sum of \$497; (2) the value of her time while she will necessarily be disabled as the result of the injury; and (3) such reasonable sum as the jury shall award her on account of any pain and anxiety she may have suffered, or will necessarily suffer, by reason of her injury. The first of these elements is the subject of direct proof, and is to be determined by the jury on the evidence they have before them; but the second and third elements are from necessity left to the sound discretion of the jury, however the damages in all cannot exceed the amounts alleged in the complaint." It is contended that the second clause of this instruction contains an erroneous and misleading statement of the law, and that it must have led the jury to render what appellant views as a verdict excessive in amount. The evidence to be considered in determining the propriety of this instruction was to the effect that the plaintiff was a woman, 65 years of age, engaged in no gainful occupation, but capable, before the accident, of taking care of herself, and accustomed to active outdoor exercise. She lived with her married daughters, part of the time in Santa Barbara, with one, and at other times in Alameda with another. The effect of the injuries sustained at the time of the accident was

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to make her permanently lame, and to render her to some extent unable to care for herself—a disability continuing up to the time of the trial, and, according to the testimony of her surgeon, likely to be permanent. This would probably impose upon her the necessity of hiring the services of some one to do for her what she could no longer do for herself, and this was an element of damage which she had a right to ask the jury to consider. The value of a person's time is the equivalent of his power to earn money, in a gainful occupation, when he is so engaged, and ordinarily means nothing more. But it is not doing violence to language to say that the ability of a person to care for himself, and the practice of doing so, instead of hiring the services of others, gives a value to his time, even if he is earning nothing, and, if so, the deprivation of such ability by the wrongful act of another imposes upon the wrongdoer the obligation to compensate him for the value of the time he can no longer employ in his own service. Construed in this light the instruction was not erroneous, though it might have been more clearly expressed. The decision in *Storrs v. L. A. Traction Co.*, 134 Cal. 91, 66 Pac. 72, is not authority for or against the point here decided. The instruction sustained in that case was different from that here in question, but it does not follow that this instruction is therefore wrong. Whether this element of damage was sufficiently pleaded, in view of the special demurrer of defendant, may admit of doubt. But, if so, the error in admitting evidence as to the extent and permanence of the injuries sustained by the plaintiff cannot have operated as a surprise to the defendant, for it appears that she had submitted before the trial to a physical examination by surgeons selected by the defendant for the purpose of ascertaining what her injuries were, and whether they had been properly treated. The error, if any, was therefore harmless.

The court did err in refusing to strike out the opinion of the witness Lutgen that the car was moving at "an unpardonable high rate of speed," but this error could have had no prejudicial effect in view of the conceded fact that the car escaped all control and descended the grade at a dangerous rate of speed, which the combined efforts of motorman and conductor were insufficient to arrest or moderate.

Numerous exceptions were taken by defendant to the admission of evidence, and refusals to strike out evidence of the suffering endured by the plaintiff in consequence of her injuries. A bystander testified that immediately after the accident she was unable to stand and suffered intensely. Her daughter testified that, when she was brought home, she was unable to walk, and was suffering intensely, and that she continued for days to suffer, could not be moved, etc. A trained nurse in charge of the case testified to the same thing, and the attending surgeon testified that her sufferings were severe. The objections to this line of testimony are that nonexpert witnesses were allowed to give their opinions as to her inability to stand and walk, and as to her suffering, and that it was error to permit them to testify to anything

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beyond her acts and exclamations indicative of present pain. The witness who testified she could not stand was one of those who assisted in lifting her from the ground and placing her on the car after the accident. Her daughter saw her carried by four men from the car to her house. The trained nurse and the surgeon had nursed and attended her during the progress of her partial recovery. All of the evidence on the part of the defendant, as well as that of the plaintiff, was to the effect that the injury to plaintiff consisted, in addition to superficial bruises, of a fracture of the neck of the femur. In view of this undisputed evidence as to the nature of the principal injury to plaintiff, the evidence that she could not stand or walk after the accident must have been harmless, for a court ought to take judicial notice of the fact that a woman with a broken thighbone will scarcely be able to walk or stand alone. As to the suffering, that also would necessarily follow from such an injury. But the evidence was not incompetent. It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to anyone of ordinary intelligence and experience. These witnesses had all observed her, and heard her groans and complaints, and were competent to give an opinion as to her suffering.

There was a conflict of evidence as to whether plaintiff sustained an impacted or unimpacted fracture of the neck of the femur. The surgeon who attended her testified that it was impacted, and it appeared that he had treated her according to that diagnosis. The surgeons who examined her for defendant testified that the fracture was unimpacted, and for the purpose of showing that the treatment she had received aggravated her injury one of these surgeons was asked two hypothetical questions, to each of which the court sustained objections. These objections, in my opinion, should have been overruled, but here again the error was harmless, for, by a mere change in the form of his questions, the defendant's counsel brought out fully the opinion of the witness as to the nature of the injury, the error in treating it, and the injurious results of the treatment.

Appellant, not claiming that plaintiff's instruction No. 7 above quoted is erroneous in any particular except that which has been already considered, makes the point that instructions were given at its request which conflict with No. 7 in other material particulars. If this was so, it would not be a reason for setting aside the verdict, but there is no conflict. Defendant's instructions merely stated, rather too favorably to it, certain qualifications of the rule announced in No. 7.

We have here considered all the points to which our attention has been directed in the petition for a rehearing, and do not deem it necessary to notice particularly other points made prior to the hearing in the district court of appeal.

We think the record presents no material error, and the judgment is therefore affirmed.

We concur: MCFARLAND, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

SALLEY v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Feb. 27, 1907.)

[56 S. E. Rep. 782.]

Carriers—Delay in Shipment—Connecting Carriers.*—A railway company accepting a bill of lading marked, "Prompt shipment required," assumes responsibility for delay of connecting carrier.

Same—Recovery of Penalty.—Under the act providing a penalty for failure to deliver freight in a certain number of hours, when notified that prompt shipment is required, Sunday is not to be included in the days for which the penalty is allowed, as freight trains are prohibited by law from running on Sunday.

Appeal from Common Pleas Circuit Court of Richland County; Klugh, Judge.

Action by J. I. Salley against the Seaboard Air Line Railway. From a judgment affirming a judgment of a magistrate, defendant appeals. Modified.

Wm. H. Lyles and E. L. Craig, for appellant.

De Pass & De Pass and Jas. H. Fowles, for respondent.

WOODS, J. This action was brought in the court of Magistrate Moorman to recover \$50 alleged to be due as damages and statutory penalty for delay in transportation of fertilizers shipped over defendant's railroad from Columbia, S. C., by Southern Oil Company to the defendant at Woodford, S. C., on March 24, 1906, and not delivered until April 5, 1906. The answer was a general denial. The judgment for \$40 penalty and \$2 damages was affirmed by the circuit court. The statute under which the penalty was claimed provides: "Be it enacted by the General Assembly of the state of South Carolina, that from and after May 15th, 1904, all railroad companies doing business in this state shall transport to its destination all freight received by them for transportation within this state within a reasonable time after receipt thereof, not exceeding the following times after midnight of the day of receipt thereof, to wit: Between points not over one hundred miles apart, seventy-two hours; between points over one hundred and not over two hundred miles apart, ninety-six hours, and between points over two hundred miles apart, one hundred and twenty hours. The nearest route by railroad shall be taken in each case as the distance between the points: Provided, that notice be given to the receiving company that prompt shipment of such freight is required, and when requested, such company shall insert in the bill of lading the words, 'prompt shipment required,' which shall be conclusive evidence of such notice, and each such company shall extend such

*See footnote appended to *Chesapeake & O. Ry. Co. v. Stock* (Va.), 22 R. R. R. 31, 45 Am. & Eng. R. Cas., N. S., 31.

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notice to its connecting line or be liable for the consequences of its failure to do so. That any such company failing to comply with the provisions of this act, except for good and sufficient cause, the burden of proof of which shall be on the company so failing, shall be subject, in addition to the liabilities and remedies now existing for unreasonable delay in the transportation of freight, to a penalty of five dollars per day for every day of delay in excess of the time hereinbefore limited, to be recovered by any consignee, who may be injured in any way by such delay, or by the owner or the holder of the bill of lading, in any court of competent jurisdiction. * * *

1. The bill of lading issued by defendant on March 24, 1906, contained the words, "Prompt shipment required," and the plaintiff testified the fertilizer was not delivered until April 5, 1906. The defendant undertook to show "good and sufficient cause" for the delay by evidence that the delay occurred on the Southern Railway Company's tracks after the bill of lading had been issued. With full knowledge of the facts, the defendant chose to issue its bill of lading before the actual receipt of the goods, and it must be held to have voluntarily assumed responsibility for them; the railroad company which had actual custody being as between the defendant and the consignee nothing more than the agent of the defendant. Whether the congestion of cars on the track of the Southern Railway Company and the alleged necessity of transferring the fertilizers to another car were "good and sufficient cause" for the delay was a question of fact decided by the magistrate and the circuit judge and hence not subject to review by this court.

2. The bill of lading was issued on Saturday, and the defendant contended the magistrate should have at least omitted Sunday in his computation of the 72 hours allowed for the shipment to reach its destination, and should have allowed judgment for seven days' penalty instead of eight days'. It is true the statute does not expressly provide Sunday shall be excluded in the computation of the 72 hours, but its exclusion is strongly implied. The general rule laid down in this country is that, where an act is required to be done in a certain number of days exceeding a week, Sunday is not excluded in the computation; but, if the number of days is less than seven, Sunday is not counted. *State v. Michel*, 78 Am. St. Rep. note 379; 28 Am. & Eng. Ency. 223. It has been held, however, that Sunday must always be counted when the time is prescribed by statute. In this case the time prescribed relates to the conveyance and delivery of freight, and, except for special trains not necessary to mention here, the running of freight trains on Sunday is prohibited. Again, it is significant the statute requires the time to be measured by hours instead of by days, and it seems fair to interpret the meaning to be working hours, hours in which railroad companies may operate their trains and deliver freight. The Sunday after the shipment should have been counted in as a part of the 72 hours, and therefore the penalty for one day should be deducted from the judgment. This conclusion, it may

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be well to say, has no application to the provisions of the Code of Civil Procedure of 1902 as to the time therein allowed for serving papers, etc., for the obvious reason that the provision of section 407, "if the last day be Sunday it shall be excluded," clearly implies, if Sunday is not the last day, it shall be included in the computation.

3. Without going into any close analysis of the evidence, it sufficiently appears there was some evidence of damage to the plaintiff in the usual course of business which the defendant had every reason to have in contemplation when the bill of lading was issued; and it is not necessary to refer the finding of \$2 damages to any special items not to be anticipated by the defendant.

The judgment of this court is that the judgment of the circuit court be affirmed, with the reduction of \$5, the overcharge in the amount found as penalty.

MISSOURI, K. & T. RY. CO. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit, March 25, 1907.)

[152 Fed. Rep. 608.]

Appeal—Record—Motion for New Trial—Court Rules.—Where rulings and instructions objected to, with exceptions thereto, were particularly set out and asserted to be erroneous in the assignments of error contained in appellant's brief, as required by Court of Appeals Rule 10, par. 3 (Ind. T. Ann. St. 1899, p. 937), and at the time the motion for a new trial was presented and ruled on, rule 3, declaring that exceptions shown in the record would be considered on appeal, irrespective of whether the ruling or action of the court was specifically set out in the motion for a new trial, if it was properly set out in the assignment of error, appellant was entitled to a consideration of such rulings, notwithstanding the subsequent amendment of rule 3, requiring the objections to be specifically set out in a motion for a new trial.

Carriers—Passengers—Ejection.*—In the absence of a regulatory statute, when a passenger refuses or fails to produce evidence of his right to transportation or pay the lawful fare after demand and being accorded a reasonable time for compliance, he forfeits his rights as a passenger, and subjects himself to ejection from the train.

Some—Tender of Fare by Third Person.*—Tender of fare by a third person, with the passenger's consent, is effective, or otherwise, to prevent a rightful ejection in the same manner as if the tender had been made by the passenger himself.

Same—Recanting—Tendering Compliance.*—Where a passenger willfully refused to establish his right to transportation or pay fare, his rejection from the train was not rendered wrongful because of a

*See foot-notes appended to *Missouri, etc., Ry. Co. v. Smith* (Ind. Terr. App.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688.

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tender of his fare by a third person, with the passenger's consent, after the process of ejection had begun.

Same—Damages—Instructions.†—Plaintiff, a passenger on defendant's train, refused to establish his right to transportation or pay fare, and during the process of ejection a third person, with plaintiff's consent, tendered plaintiff's fare to the next station, which was not plaintiff's destination. Held that, if the ejection was wrongful, plaintiff was only entitled to recover damages for loss of time and inconvenience in reaching the station to which his fare was tendered, and that an instruction authorizing a recovery for inconvenience in being compelled to reach his "destination" by other means was erroneous.

In Error to the United States Court of Appeals in the Indian Territory.

See 89 S. W. 668.

Clifford L. Jackson, for plaintiff in error.

Preston S. Davis and *William P. Thompson* (*Dennis H. Wilson*, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action against a railroad company for the wrongful ejection of a passenger from one of its trains. Briefly stated, the case presented by the evidence was this: The plaintiff, while riding upon a north-bound passenger train of the defendant, was ejected therefrom, between the stations of Choteau and Pryor Creek, upon his failure to produce a ticket, or other evidence of a right to transportation, or to pay his fare, when requested to do so by the conductor. He had entered the train at Choteau, or at Eufaula, a more southerly station, and his destination was Adair, a station north of Pryor Creek. He had no ticket or other evidence of a right to transportation, and was not intending or prepared to pay his fare. After the process of ejection had begun, and before its completion, a third person volunteered, with the plaintiff's assent, to pay his fare from the point at which he had entered the train to Pryor Creek. The conductor rejected this offer, saying, in substance, that he had given the signal for the train to stop, which it was then doing, and that the plaintiff was an impostor and had been put off several times before. There was conflicting evidence from which either of two conclusions could be reasonably drawn: One, that the plaintiff entered the train under the mistaken but honest belief, engendered by matters which need not be recited, that he could properly, and would be, carried to his destination, notwithstanding he was without a ticket or other evidence of a right to transportation and was not intending or prepared to pay his fare; and

†For the authorities in this series on the subject of the damages recoverable against a carrier of passengers, for the ejection of or for refusal or failure to carry a passenger, or for delay in transporting him, see foot-notes appended to *Sappington v. Atlanta & W. P. R. Co.* (Ga.), 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846; foot-note appended to *Louisville & N. R. Co. v. Fowler* (Ky.), 21 R. R. R. 299, 44 Am. & Eng. R. Cas., N. S., 299.

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the other, that he was attempting fraudulently to secure transportation and to evade paying therefor, when he knew that he was not otherwise entitled thereto. In the course of the trial specific exceptions were reserved by the defendant to rulings of the court in the admission and rejection of evidence and to portions of the charge to the jury. A verdict was returned for the plaintiff, and the judgment entered thereon was subsequently affirmed upon the defendant's appeal to the Court of Appeals of the Indian Territory. 89 S. W. 668. The case was then brought to this court upon a writ of error.

Upon the ground that they had not been set out with sufficient detail or precision in the motion for a new trial in the trial court, the Court of Appeals declined to consider some of the rulings and instructions to which exceptions were reserved, as before stated. In this we think there was error. When the motion for a new trial was presented and ruled upon, and when the appeal was perfected, rule 3 of the Court of Appeals provided:

"And this court will consider any and every ruling or action of any of the district courts of this territory to which objection or exception was made or taken at the time of the trial, as the same is shown in the record in any given cause, irrespective of the fact whether such ruling or action of the court be set out especially in the motion for a new trial or not, provided that such ruling or action be set out in the assignment of errors, as required in paragraph 3 of rule 10." Ind. T. Ann. St. 1899, p. 937.

The rulings and instructions before named, with the exceptions thereto, were shown in the record by a proper bill of exceptions and were particularly and separately set out and asserted to be erroneous in the assignment of errors contained in the appellant's brief, as required by paragraph 3 of rule 10. True, after the appeal was perfected, rule 3 was changed in respect of the manner in which errors claimed to have been committed at the trial should be specified in the motion for a new trial; but this change, whatever may be its prospective operation, did not and could not affect cases in which it was not possible to comply therewith by reason of their having theretofore passed beyond the stage of a motion for a new trial. This case was in that situation, and the Court of Appeals should have considered and disposed of it in conformity with the original rule.

Two of the instructions to which exceptions were reserved were treated by the Court of Appeals as properly presented for its consideration, and it was held that neither gave cause for reversal. One of these was as follows:

"The court instructs the jury that if they find from the evidence that, before the train was stopped, some other person or persons offered to pay the fare of the plaintiff due to defendant, to the conductor in charge of the train of the defendant company, that said fare so offered cannot be refused, no matter who makes it, and you should find for the plaintiff and against the defendant."

In the absence of a regulatory statute—and there is none here—when a passenger refuses or fails to produce evidence of his

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right to transportation or to pay the lawful fare, after due demand therefor, and after being accorded reasonable time and opportunity for compliance, he forfeits the rights of a passenger, and subjects himself to ejection from the train. And while there is some contrariety of opinion respecting the effect of a subsequent tender of compliance, the better and prevailing rule is that, when the refusal is willful, persistent, or capricious, or proceeds from a fraudulent purpose to evade paying for transportation to which he knows he is not otherwise entitled, the passenger cannot, by recanting and tendering compliance, after the process of ejection has begun, entitle himself to transportation and render the completion of the ejection wrongful. *State v. Campbell*, 32 N. J. Law, 309; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Pease v. Railway Co.*, 101 N. Y. 367, 5 N. E. 37, 54 Am. St. Rep. 699; *Clark v. Railroad Co.*, 91 N. C. 506, 49 Am. Rep. 647; *Railroad Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53; *Railroad Co. v. Garrett*, 8 Lea (Tenn.) 438, 41 Am. Rep. 640; *Railroad Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 668; *Garrison v. Railway Co.*, 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452; *Harrison v. Fink* (C. C.) 42 Fed. 787; 2 *Hutchinson on Carriers* (3d Ed.) § 1085; 4 *Elliott on Railroads*, § 1637. When the tender is made by a third person, with the passenger's assent, it will be effective, or otherwise, in like manner as if made by him. *Railroad Co. v. Garrett*, 8 Lea (Tenn.) 438, 445, 41 Am. Rep. 640.

Tested by these rules, the instruction not only did not contain a correct statement of the law, but, when applied to the case made by the evidence, as before recited, was calculated to operate prejudicially to the defendant, because it erroneously gave the jury to understand that, even though the plaintiff's refusal or failure to comply with the conductor's lawful demand proceeded from a fraudulent purpose to evade paying for transportation to which he knew he was not otherwise entitled, a subsequent offer by a third person to pay his fare, made after the process of ejection had begun and before the train was brought to a stop, would entitle him to transportation, and would render the completion of the ejection wrongful.

The other instruction related to the measure of damages, and was as follows:

"The elements that go to make up the damages which the jury is to consider in this case, and which the plaintiff may be entitled to receive, are: Loss of time, humiliation in being put off of the train of the defendant company, and the inconvenience of being compelled to reach his destination by other means, together with any suffering of mind and of body that he was compelled to undergo by reason thereof, and any and all damages sustained by him as the direct and natural consequence of the fault of the said defendant company, in the event that you find from the evidence that the plaintiff was wrongfully and unlawfully evicted from the train."

As before stated, the plaintiff's destination was Adair, but in no permissible view of the evidence was he entitled to transportation

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to that place. The tender which was made in his behalf did not include the fare to Adair, but only that to Pryor Creek, the next station beyond the point where he was ejected. So, if the ejection was wrongful, he was entitled to damages for loss of time and inconvenience in reaching Pryor Creek by other means, but not in reaching Adair, his destination.

As there was prejudicial error in each of these instructions, the judgment of the Court of Appeals and that of the trial court are reversed, and the case is remanded to trial court, with a direction to grant a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. v. WAINWRIGHT.

(Circuit Court of Appeals, Eighth Circuit, March 11, 1907.)

[152 Fed. Rep. 624.]

Carriers—Injury to Passengers—Premature Starting of Train—Question for Jury.*—In an action against a railroad company to recover for a personal injury, the evidence was conflicting, but in one aspect tended to show that, while a vestibuled train of defendant was stopped to let off and take on passengers at a station platform where there was no depot or agent, plaintiff, after waiting until passengers came out, as required by defendant's rules, immediately started to go up the steps while the train was yet stationary and the vestibule doors open, intending and prepared to pay his fare and become a passenger; that, as he placed one foot on the step, the train suddenly started, and his other foot struck against a pile of freight on the platform in close proximity to the cars, and he was dragged from the steps under the car and injured. Held, that such evidence, if believed, warranted a finding that plaintiff was intending to take passage on the train, in which case he was entitled to the same protection as an accepted passenger and to a reasonable time to enter after the other passengers had alighted; that he acted with due care, and his injury was due solely to the negligence of defendant's servants in starting the train before he could do so; and that therefore it was not error to refuse to direct a verdict for defendant.

Writ of Error—Review—Discretion of Court—Ruling on Motion for New Trial.—A motion for a new trial in a federal court is addressed to the sound discretion of the court, and its ruling thereon cannot be assigned as error.

*For the authorities in this series on the question who are, and are not passengers, see foot-notes appended to *Malott v. Central Trust Co. of Greencastle (Ind.)*, 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189; foot-notes appended to *Chicago Union Traction Co. v. Rosenthal (Ill.)*, 21 R. R. R. 747, 44 Am. & Eng. R. Cas., N. S., 747; foot-notes appended to *Waller v. Wilmington City Ry. Co. (Del. Sup'r. Ct.)*, 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Smallwood v. Baltimore & O. R. Co. (Pa.)*, 21 R. R. R. 290, 44 Am. & Eng. R. Cas., N. S., 290; *Colorado Springs, etc., Ry. Co. v. Petit (Colo.)*, 21 R. R. R. 132, 44 Am. & Eng. R. Cas., N. S., 132.

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In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

J. C. Hawthorne (*S. H. West*, on the brief), for plaintiff in error.

J. W. House (*H. A. Parker* and *M. House*, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action to recover for injuries sustained by the plaintiff below while he was in the act of entering a passenger train of the railway company at Keevil, Ark., with the purpose of becoming a passenger. The negligence charged against the defendant was that freight was piled upon the station platform too near the track, that the train was not stopped long enough to permit intending passengers to enter in safety, and that after the plaintiff had placed one foot upon the steps to the car, and when he was lifting the other thereto, the train was suddenly started, and he was quickly carried against the freight upon the platform, and was thereby pulled off the steps and thrown under the train. In its answer the defendant denied that the plaintiff intended to become a passenger, and that it was guilty of any of the negligence charged, and alleged that the plaintiff's injuries were occasioned by his own negligence. The trial resulted in a verdict and judgment for the plaintiff.

Complaint is made of the court's refusal to direct a verdict for the defendant. The evidence was conflicting, and, in one view, tended persuasively to show these facts: The train in question was a vestibule passenger train and stopped at Keevil to let off and take on passengers. There was no depot or agent there, and a portion of the platform had become incumbered by freight which was piled thereon to within 17 inches of the train and to a height of 4 feet. After the train came to a stop, the plaintiff presented himself on the platform, at the place where the vestibule doors were open and passengers were alighting. He intended to take passage to a near-by station, at which the train regularly stopped, and was prepared and expected to pay his fare. A rule of the defendant, of which he had knowledge, forbade intending passengers to enter until after those who were debarking had alighted. Immediately after the passengers for that station had alighted, and while the train was yet stationary and the vestibule doors open, he took hold of the handrails, placed one foot upon the steps to the car, and was in the act of raising his other foot thereto, when the train suddenly started, and the foot which he was raising was quickly carried against the projecting pile of freight, whereby he was pulled off the steps, thrown under the train, and sustained severe injuries. The trainmen did not observe that he was intending or attempting to enter the train, but they could readily have done so had they been attentive to their duties. As before stated, the evidence was conflicting; but, putting upon it the construction most favorable to the plaintiff, as must be done in considering the present complaint, we think it amply justified the

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jury in finding that the plaintiff intended to take passage upon the defendant's train and presented himself in proper place, at the proper time, and in a proper manner to do so; that he was impliedly invited to enter the train as a passenger, and was impliedly assured that he would have a reasonable time in which to do so after those who were debarking had alighted; that he was acting upon this invitation and assurance and was proceeding with reasonable prudence and promptness when the train was started; that the defendant was negligent in the respects charged, and that its negligence was the proximate and sole cause of the plaintiff's injuries. And as, upon such a state of facts, he would plainly be entitled to recover, in like manner as if he had been expressly accepted as a passenger, the request for a directed verdict was rightly denied. Hutchinson on Carriers (3d Ed.) §§ 1005, 1111; 4 Elliott on Railroads, § 1628; 5 Am. and Eng. Enc. (2d Ed.) 488, 576; 6 Cyc. 538, 612; Cohen v. West Chicago St. Ry. Co., 9 C. C. A. 223, 60 Fed. 698; Texas & Pacific Ry. Co. v. Gardner, 52 C. C. A. 142, 114 Fed. 186; Washington, etc., Co. v. Patterson, 9 App. D. C. 423; Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; Curtis v. Detroit & Milwaukee R. R. Co., 27 Wis. 158, 168; Webster v. Fitchburg R. R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Cleveland, etc., Co. v. Wade, 18 Ind. App. 346, 48 N. E. 12; Western & A. Ry. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; St. Louis Southwestern Ry. Co. v. Cannon (Tex. Civ. App.), 81 S. W. 778; Hatch v. Ry. Co., 212 Pa. 29, 61 Atl. 480.

Complaint is also made of the denial of a motion for a new trial, but it has long been settled that in the federal courts such a motion is addressed to the sound discretion of the court, and that the ruling thereon cannot be assigned as error. Southern Pacific Ry. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171; City of Manning v. German Ins. Co., 46 C. C. A. 144, 107 Fed. 52; Van Stone v. Stilwell & Bierce Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085.

No error being disclosed by the record, the judgment is affirmed.

WALLACE v. BALTIMORE & O. R. Co.

(Supreme Court of Pennsylvania, Jan. 7, 1907.)

[65 Atl. Rep. 665.]

Carriers—Lien for Demurrage.*—A railroad company has no lien for demurrage on property transported over its road.

Injunction—Remedy at Law.—A bill for injunction against a railroad company for refusal to deliver three cars loaded with freight belonging to plaintiffs, which the railroad company claimed to hold for demurrage charges, will not lie as plaintiff has an adequate remedy at law either in replevin or trespass.

Bill by F. W. Wallace and M. L. Wallace against the Baltimore & Ohio Railroad Company. Decree for plaintiffs, and defendant appeals. Reversed.

The court entered the following decree: "That the said defendants be, and they hereby are, severally perpetually enjoined and restrained from refusing, neglecting, or delaying to deliver to the plaintiffs the cars of lumber and freight consigned to the said plaintiffs upon the siding mentioned in the plaintiff's bill of complaint, upon payment or tender of the freight charges due on said cars, and that defendants be and they hereby are, severally specially required, ordered and directed to deliver to the plaintiffs, upon their siding mentioned in the bill of complaint, all cars of freight consigned to the plaintiffs, and now or hereafter to come into the possession or control of the defendant company, upon payment or tender of the freight charges thereon."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Wylie McCaslin, and *Arrel, Wilson & Harrington*, for appellant.

J. Norman Martin, for appellee.

BROWN, J. The appellees are lumber dealers in the city of New Castle. They own a railroad siding or switch connected with the Baltimore & Ohio Company's line of railroad, on which that company has for many years been delivering to them car loads of lumber consigned to them. On September 11, 1904, the company sent an engine to the siding and took possession of three cars standing on it, loaded or partly loaded with lumber belonging to the appellees, and which had been delivered to them by the company on the said siding. These cars were taken away from the siding by the railroad company because the appellees had refused to pay demurrage charged for their alleged unreasonable detention. The claim of the company was that it had a lien for such demurrage. This bill was filed asking for an injunction

*See extensive note, 22 R. R. R. 247, 45 Am. & Eng. R. Cas., N. S., 247.

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to restrain the railroad company from refusing, neglecting, or delaying to deliver cars of lumber and freight consigned to the appellees upon the siding upon their payment or tender of the freight due, and that it be required to deliver to them, upon payment or tender of the freight charges, all cars or freight consigned to them which were then in or might come into its possession. In its answer the appellant denied the allegation in the seventh paragraph of the bill, which was that the appellees had other cars consigned to them which were held by the company in its yards and sidings, and that other car loads of lumber had been ordered and purchased by them and would soon arrive in the yards of the defendant company, which was refusing, and continued to refuse, to deliver upon their siding car loads of lumber and freight consigned to them.

The appellant had no lien upon the cars taken from the siding for demurrage (*Nicolette Lumber Co. v. People's Coal Co.*, 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550), and it had, therefore, no right to refuse to allow the appellees to unload the cars because demurrage was not paid. There is nothing in the case to show that such a lien existed in favor of the appellant. The only cars which the company refused to deliver to the appellees were the three taken from the siding. M. L. Wallace, one of the appellees, admits in his testimony that he had not demanded delivery of any other cars, and that the company had not refused to deliver them. In the court's findings of fact it does not appear that the company had refused, upon demand, to deliver to the plaintiffs any other cars than these three. The case as presented below was, therefore, not that of common carrier refusing to perform its duty generally to the appellees, resulting in irreparable injury to them in their business, but simply a refusal to deliver to them on their siding three particular car loads of lumber. For the refusal of the company to deliver these there was an adequate remedy at law, either in trespass or replevin, and the proceeding ought to have been on the common-law side of the court. If the appellees had shown persistent refusal on the part of the appellant to perform its constant duty to them, a different situation would be presented, and equity would furnish the only adequate relief, but it will not interfere when all the complainants are able to show is a refusal to deliver specific articles, for the refusal to deliver which there is compensation in damages. For this reason the twelfth assignment of error is sustained.

The decree of the court below is reversed, and it is now ordered, adjudged, and decreed that the plaintiff's bill be dismissed, with costs to the appellant.

CHILES v. CHESAPEAKE & O. RY. Co. et al.

(Court of Appeals of Kentucky, April 16, 1907.)

[101 S. W. Rep. 386.]

Civil Rights—Carriage of Passengers—Rules of Carrier—Separate Apartment for Colored Passengers.*—A railroad company may, independent of statute, adopt and enforce rules and regulations requiring colored passengers, although they may be interstate passengers, to occupy compartments in coaches separate from those occupied by white passengers, if they are substantially equal in quality and accommodations to those furnished white passengers having similar tickets.

Appeal from Circuit Court, Fayette County.

“To be officially reported.”

Action by J. Alexander Chiles against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. J. Bronston, Allen & Duncan, B. F. Smith, and J. A. Chiles, for appellant.

Geo. T. Shelby, for appellee.

CARROLL, C. Appellant, a negro, bought a first-class ticket over the appellee's line of railway from Washington, District of Columbia, to Lexington, Ky. At Ashland, Ky., on the line of railway between Washington and Lexington, all passengers for Lexington, except those occupying sleeping cars, are required to leave the train on which they come from Washington and get on a train that leaves Ashland for Lexington. When the Washington train, upon which appellant was a passenger, arrived at Ashland, in company with the other passengers in the day car in which he was riding, he got out for the purpose of getting on the Lexington train. This Lexington train is made up of four coaches, the first, and the one nearest the engine, being a combined baggage, mail, and express car. The second is a passenger coach, divided by board partitions, into three compartments. One of these compartments located in the end of the car is set apart for colored passengers, the middle compartment is for the use of colored passengers who smoke, and the end compartment is for the accommodation of white persons who smoke. The third car is a passenger coach intended for the use of white ladies and gentlemen. The fourth car is a sleeping car that runs through from Washington to Lexington. Appellant, when he attempted to get on the Lexington train, was told by the brakeman to go in the colored apartment. This he declined to do, and walked in and took a seat in the third coach set apart for the exclusive use of white passengers. In a few moments the conductor came in and asked the appellant in obedience

*See extensive note, 4 R. R. R. 490, 27 Am. & Eng. R. Cas., N. S., 490.

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to a rule of the company to go forward in the apartment set apart for colored passengers, but he refused to do so, stating that he had bought a through first-class ticket from Washington to Lexington, and was an interstate passenger who knew his rights, and that the separate coach law of Kentucky did not apply to him, and declared his intention of retaining the seat he occupied. Thereupon the conductor summoned a policeman, who also requested appellant to go in the other car, and, upon his refusal, he was informed that he would be compelled to leave the car in which he was seated. Appellant, yet insisting upon his right to remain in the car in which he was, followed the policeman into the colored passenger coach.

Afterwards he brought this action against the company for damages, alleging in his petition that he had purchased in Washington a first-class ticket for transportation to Lexington, Ky., and that he was forcibly and wrongfully ejected from the first-class car in which he was seated, thereby subjecting him to great mortification and humiliation, to his damage in the sum of \$10,000. In its answer appellee set up that the car from which appellant was required to remove at Ashland was one set apart under its rules and regulations exclusively for the transportation of white passengers, and the car into which he was compelled to go was under its rules and regulations set apart exclusively for the accommodation and transportation of colored persons; that it was a first-class car, equal in quality, convenience, and accommodation to the car appellant was directed to remove from. A reply was filed, controverting the affirmative matter in the answer, and upon a trial before a properly instructed jury a verdict was returned for appellee.

There is really no material issue of fact involved in the case. No force or violence, or rude or oppressive conduct, was employed by the agents of appellee in removing appellant from the car in which he was seated to the car set apart for colored persons; and, except that the car into which he was removed is divided by partitions into three compartments, it was substantially equal in quality, convenience, and accommodation to the car in which he first seated himself, and the compartment into which appellant was directed to go was clean and ample for his accommodation, and equipped with the same conveniences as the other passenger coach on the train from which he was ejected. It is admitted that sections 795-801 of the Kentucky Statutes, requiring all railroad companies to furnish separate coaches for transportation of white and colored passengers, and imposing upon the company and conductors a penalty for refusing or failing to carry out the provisions of the law, does not apply to appellant, who was an interstate passenger; it being conceded that the statute is only operative within the territorial limits of this state, and effective as to passengers who travel from one point within the state to another place within its border. The question presented for our consideration is: Has a common carrier, such as a railroad company, the right, independent of the statute, to establish reasonable rules and regulations for the transportation of passengers, and to

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establish such rules and regulations as will require white and colored passengers, although they may be interstate, to occupy separate coaches or compartments upon the train? To put it in a simpler form, and one that will present squarely the issue involved: Has a railroad company within this state, independent of any statute, the right to adopt and enforce rules and regulations requiring colored passengers, although they may be interstate, and solely because of their color and race, to occupy coaches or compartments in coaches separate and distinct from those occupied by white persons? Both of these queries must be answered in the affirmative. A passenger who purchases a ticket entitling him to transportation on a railroad, and who conducts himself properly, and is not laboring under any mental or physical infirmity or disease that would render it unsafe, improper, or dangerous to carry him, has the right to demand that the carrier shall furnish him with accommodations and conveniences substantially equal to those given to other passengers holding similar tickets; but, subject to these qualifications, a railroad company may adopt and enforce reasonable rules and regulations for the transportation of passengers, such as requiring that those who smoke shall occupy a certain car or compartment, or that gentlemen not accompanied by ladies shall take a car other than the one set apart for the exclusive use of ladies. Many other regulations not here necessary to mention may be made; the rule being that the passenger takes his ticket with the understanding that he will conform to all the reasonable regulations of the carrier as to the conduct of the carriage, it being understood and recognized as the law that the carrier assumes the responsibility of the reasonableness of the regulation, and, if it should be held unreasonable, the carrier will be liable in damages to the passenger against whom it was enforced. *Hutchison on Carriers*, § 1077. In 6 Cyc. p. 545, the rule, supported by numerous authorities, is thus stated. "Without regard to any statutory authority, a carrier of passengers has under the common law the right to make reasonable rules and regulations for the conduct of his business. The passenger is not bound to comply with the rules and regulations if they are unreasonable, but such rules as tend to the comfort, order and safety of the passenger or passengers may be made and enforced, if reasonable with reference to the subject-matter and uniform in respect to the persons affected. As the validity of a regulation does not depend upon contract, express or implied, but upon the general power of the carrier to control his business, therefore there is not the necessity which exists with reference to a special contract regulation of bringing it home to the passenger so that his assent thereto shall appear. The passenger is bound to take notice of reasonable regulations."

Resting upon this ancient and general doctrine of the right of carriers to establish reasonable rules and regulations for the transportation of passengers, it has come to be a well-settled principle of law that in the carriage of white and colored passengers carriers have the right, independent of any statute, to enact rules

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and regulations requiring colored persons, solely because of their race and color, to occupy coaches and compartments in coaches separate and distinct from those set apart for and occupied by white persons. And this rule extends to all passengers, without reference to whether they are intrastate or interstate. This principle does not distinctly involve a discrimination against the colored race, but rests more particularly upon the right to separate and classify the races, affording to each substantially equal comforts, conveniences, and accommodations. Carriers cannot discriminate against a passenger merely because of his color. The colored man who conducts himself properly, and in other respects has the right to be received as a passenger, and who purchases a first-class ticket, is entitled to demand that the carrier shall furnish him carriage substantially similar in quality, convenience, and accommodation to that afforded to white persons having similar tickets. But, whilst the carrier cannot in the manner of service or accommodations discriminate between passengers holding similar tickets solely on account of their color, it has the right to separate and classify them. There is a wide difference between classification and regulation involving a separation of the races and a discrimination between them. When there are two cars in a train, or two compartments in a car, substantially alike in quality, convenience, and accommodation, neither white nor colored passengers have the legal right to complain that they have been discriminated against merely because the carrier required each race to occupy a car or compartment set aside for its accommodation. And this upon the ground that the carrier in the conduct of his business, and in the interest of the public, may enact and enforce reasonable rules and regulations to preserve peace, maintain order, promote comfort, and contribute to the pleasure and convenience of the passengers. That there is a natural, well-marked difference between the white and colored races goes without saying. That this racial distinction in many places and with many persons develops into a deep-seated antipathy between the races, resulting too often in conflict and bloodshed, is a matter of common knowledge. For this distinction, the consequences that flow from it, and the difficult problems that grow out of it, appellant is in no wise responsible. It had its origin in the creation of the races, and is firmly established as a part of the social and domestic order and economy of the country, and the man or set of men of either race who attempts to ignore or obliterate these distinctions and differences undertakes an impossible task. This racial distinction, and the resulting classification, is recognized by Legislatures, authorized by courts, sanctioned by custom, and approved by an enlightened public opinion. It is not confined to any community, state or nation, but is found wherever the two races abound in sufficient numbers to make noticeable the impassable chasm that separates them. In the home, the school, the church, the public place—in truth, everywhere—it exists. These observations are not set down in any spirit of unkindness or hostility to the colored race, or with a view to create or encourage discrimination or re-

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pression that will place obstacles in the way of their improvement or advancement, but rather to note an irremovable and remediless condition that must be acknowledged and that will steadfastly be adhered to.

This question of the right of carriers to classify and separate white and colored passengers has been the subject of consideration by a number of courts, as well as the Supreme Court of the United States, and there is practically unanimity of opinion in the decisions relative thereto; the leading case on the question perhaps being that of *Westchester & Philadelphia R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744, in which it is stated: "The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. The private means he uses belong wholly to himself, and imply the right of control for the protection of his own interest, as well as the performance of his public duty. He may use his property therefore in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum and to prevent contacts and collision arising from natural or well-known customary repugnances, which are likely to breed disturbances by promiscuous sitting. It is much easier to prevent difficulty among passengers by regulation for their proper separation than it is to quell them. The danger to the peace engendered by a feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro takes a seat beside a white man, or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards the breach of the peace it may have caused." And the court held that the rights of the carrier to adopt and enforce reasonable rules providing for the separate carriage of white and colored passengers was entirely within its powers. And this case was approved by the Illinois Supreme Court in *Chicago & Northwestern Ry. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641.

In *Hall v. De Cuir*, 95 U. S. 505, 24 L. Ed. 547, the Supreme Court of the United States—a case involving the right of the carrier to classify and separate white and colored passengers—in substance held that the carrier, so long as the conveniences and accommodations furnished were substantially equal, had the right to adopt reasonable rules and regulations for the separation and classification of white and colored passengers. In *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, the Supreme Court, in upholding the validity of a statute similar to the one in force in this state compelling railroad companies to provide separate coaches or compartments for colored people, recognized the right of carriers to establish reasonable rules and regulations for the separation and classification of the races, although in that

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case the question of the rights of an interstate passenger was not involved. To the same effect is the opinion of that court in *Chesapeake & Ohio Railway Company v. Commonwealth of Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244.

In *The Sue*, decided by the federal court, and reported in (D. C.) 22 Fed. 843, where the question involved was the right of a carrier to separate white and colored passengers, Judge Morris said: "The great weight of authority, it seems to me, supports the doctrine that to some extent at least, and under some circumstances, such a separation is allowable at common law, and I think it is not going too far to say that such is the decided leaning of the Supreme Court of the United States as expressed in the opinion pronounced in *Hall v. De Cuir*. The Supreme Court appears to treat the question as one with regard to which reasonable usages which now exists can only be controlled by legislation, and holds that, if public policy requires such legislation, it must come from Congress. It has been argued that the constitutional amendments, which assure to colored people all political rights of citizens of the United States and of the states, and were intended to having obliterated color as a distinction with regard to political rights, of necessity make such color discrimination unlawful in carriers as against the declared public policy of the nation. In view of the authoritative interpretation of those amendments, I cannot so hold. It is a question with which citizenship had but little to do. If it was found that naturalized citizens of English or Irish birth or the French and German nationality interfered with each other's comfort, or with the discipline of the boat when occupying the same sleeping cabins, the court might well find a regulation which enforced a separation between them was reasonable, and therefore lawful. But to say that regulations based on conditions of race or color may be lawful is not to say that every such regulation can be upheld. The regulation must not only be reasonable, in that it conduces to the general comfort of the passengers, but it must not deny equal conveniences and opportunities to all who pay the same fare."

In *Houck v. Southern Pacific Ry. Co.* (C. C.) 38 Fed. 226, the court said: "The defendant contends that the evidence shows that the front car which was set apart by the company for colored people was as safe and was substantially equal in its conditions to the rear car, and to which he was denied entrance. These recitals make up the issue of law and fact. In accordance with the contention of these counsel, the court charged the jury that a common carrier, a railway company, may or might be under a proper showing of facts justified and authorized in law in the management of its complicated interests in setting apart one or more coaches for the use exclusively of white people, and to set apart other cars for the use exclusively of colored people; but, when the management undertakes to carry out such a rule, it is charged with the duty of giving or furnishing to the colored passengers who pay first-class fare over the line a car to ride in as safe and substantially as inviting to travel in as it furnishes to white pas-

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sengers. The defense having shown some facts in relation to the population along the railway, and as to the kind and character of persons who often become passengers on their trains, which were thought by the court to be sufficient to authorize the management to require by its rules that the rear car or one of the cars in the train should be occupied exclusively by white people, the jury were directed to consider for the purposes of this case that the defendant company was justified in law in the enforcement of such a rule. And the plaintiff cannot complain of an injury coming to her because she was denied entrance to the rear car, provided it was shown satisfactorily to them that the car into which Mrs. Hough was told to go by the conductor was as safe and substantially as comfortable in its conditions as the car to which she was denied admission."

In *Murphy v. Western Atlantic R. Co.* (C. C.) 23 Fed. 637, Judge May said: "I believe that, where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but, if the railroads charge the same fare to each race, it must furnish substantially alike and equal accommodations. A railroad company may make all needful rules and regulations in the conduct of its affairs, but such rules must be reasonable and impartial—fair to all. If it separates passengers upon the color line, it must treat each alike from the intrusion of the other. If it give to white people one end of the car, and colored people the other end, and exclude colored people from the white end, it must also exclude white people from the colored end. A passenger has no right to select the car upon which he will travel without direction or interference on the part of the carrier. When he proposes to take a train, the trainmen may designate the car which he may enter, and he has no right to complain if such car is as comfortable and convenient in its equipment as the other of like character."

It will thus be seen that the principal matter to be considered in cases of this character is not the color of the passenger, but whether or not he has been furnished accommodations substantially equal in quality, convenience, and comfort to those holding similar tickets. This issue was fairly submitted to the jury by the instructions of the court, and their finding was, in effect, that no discrimination was made against appellant in respect to the accommodations furnished him.

The judgment of the lower court must be affirmed.

PULLMAN COMPANY v. GREEN.

(Supreme Court of Georgia, April 12, 1907.)

[57 S. E. Rep. 233.]

Carriers—Sleeping Car Company—Loss of Passenger's Baggage.*—

It is the duty of a sleeping car company to exercise reasonable care to guard the personal effects of a passenger from theft; and, if through the want of that care such effects as a passenger may properly carry with him on his journey be stolen, the company will be liable therefor. The personal effects which a passenger may properly carry with him on a journey may include articles of personal adornment, such as jewels and the like.

Same—Evidence.—The evidence authorized the verdict. The charge excepted to was not erroneous for any reasons assigned.

The requests to charge, so far as legal and pertinent, were covered by the general charge. No sufficient reason appears for reversing the judgment refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by M. J. Green against the Pullman Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The plaintiff sued the Pullman Company, alleging in her petition that the company operated what are known as "sleeping cars," and that she was a passenger on one of such cars operated by the company, having paid her fare for her berth and entertainment in the car from Baltimore, Md., to Macon, Ga.; that the company undertook, and were bound, to provide her with a berth, and to use reasonable care to see that the berth was properly guarded, and that her personal effects and baggage were protected, from the time she became a passenger until she reached her destination; and that while she was such a passenger, through the negligence and the failure of the defendant in performing the undertaking and duty above referred to, her handbag and contents were stolen from her berth. The contents consisted of rings, eyeglasses, a watch, and other articles for personal adornment, and money, and the bag and its contents were of the aggregate value of \$1,670. The rings, jewelry, etc., are described in the petition, and are alleged to be articles of personal adornment and utility, usually and ordinarily worn by the plaintiff, and which she had simply taken off for the night and placed in her handbag. It is alleged that on the morning of a named date, while she was still a passenger, she left her berth and went to the toilet room to make her morning toilet, leaving the handbag and its contents in the berth, under the pillow, where they had been placed during the night; that after reaching the toilet room it occurred to her that

*See foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782.

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she had left her handbag and jewelry in her berth, and, before completing her toilet, she returned to the berth to get them, and found that the porter was making up the berth, and that the handbag and its contents had been stolen or were missing, and she has never recovered any part of the same or been paid therefor. She lays damages in the amount above stated, and prays for a judgment. By amendment it was alleged that the defendant did not properly watch and guard the car so as to prevent the theft, and by failure to keep proper watch over the berth of the plaintiff, and the failure to properly guard and preserve her effects contained therein, they were stolen by some one unknown to her. The defendant filed a demurrer upon several grounds, but at the hearing abandoned all the grounds except the one setting up that the petition set forth no cause of action, and another that the petition did not set forth with sufficient distinctness the particulars in which the agents of defendant were negligent, and what agents and employees were so negligent. The demurrer was overruled. The trial resulted in a verdict in favor of the plaintiff for the amount sued for. The defendant's motion for a new trial was overruled. It excepted to the overruling of its demurrer, and to the refusal of a new trial.

Jos. H. Hall and Dorsey, Brewster & Howell, for plaintiff in error.

Claud Estes, for defendant in error.

COBB, P. J. (after stating the facts). It is the duty of a sleeping car company to exercise reasonable care to guard the personal property of the passengers from theft, and if, through the want of such care, his personal effects, or some of them, were stolen, the company would be liable for such of the stolen valuables as the passenger might reasonably be expected to carry with him on his journey. This is the rule of liability as settled by the decisions of this court, and has been declared to be in accord with the weight of authority elsewhere. *Pullman Co. v. Schaffner*, 126 Ga. 612, 55 S. E. 933. See, also, *Pullman Palace Car Co. v. Martin*, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498; *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. 186; *Pullman Palace Car Co. v. Harvey*, 101 Ga. 733, 28 S. E. 989. In all of the cases cited the loss occurred while the passenger was asleep. In *Pullman Palace Car Co. v. Hall*, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293, the loss occurred in the daytime and while the passenger was not asleep. This was a peculiar case. The baggage was stolen by a thief who was on the outside of the car, standing on a rod, and reaching through the window and taking the valise from the seat. At that time the car was in motion, going at a rate of five or six miles an hour, through the railroad yard adjacent to a city, the rear door was securely locked, and the conductor and porter were guarding the front door. Under these circumstances it was held, by a majority of the court, that the evidence did not authorize a finding that that company had been lacking in the exercise of reasonable care; that the occurrence was

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so unusual and peculiar that it could not have been reasonably foreseen and guarded against. Mr. Justice Lewis dissented, being of the opinion that the evidence was sufficient to sustain a verdict holding the company liable. The rule above referred to was recognized by all the justices, the only difference being as to its application to the peculiar facts of that case. The liability of the company for a loss occurring during the night, when the passenger is asleep, has been rested upon the proposition that the company invites the passenger to sleep, and therefore owes him the duty of reasonable care to protect his personal effects while he is asleep. There is generally in such cars a toilet room, which the company invites the passenger to use when he rises in the morning. When the invitation of the company is accepted, the duty to guard his personal effects left in his berth, while he is absent therefrom, is founded upon a similar reason to that which requires a guard to be maintained while he is asleep during the night. He cannot guard his effects himself while he is asleep. Neither can he guard his effects in his berth during the morning when he is necessarily absent therefrom for the purpose of making his toilet in a place set apart by the company for that purpose. In *Kates v. Pullman Co.*, *supra*, it was held that proper diligence of the sleeping car company towards its patrons involves the exercise of reasonable care to secure the safety of the passenger's property while on its cars, and, upon his leaving it, a restitution of the property to its owner when ascertained, and that where such property is left, or dropped, in such place, under such circumstances as that by the exercise of ordinary care it ought to have been found by them, the company will be liable for its value. If the company owes to a passenger the duty of ordinary care to find property left by him in the car when he disembarks from the car, it would seem that there can be no question that the company owes him a duty to protect such valuables as may be in the berth of the car when he leaves the berth upon the invitation of the company, to be temporarily absent for a proper purpose, such as the purpose for which the plaintiff left her berth in the present case. It was contended that there was nothing to put the company on notice that the plaintiff would leave her valuables in the berth. There was nothing in the *Kates Case* to put the company on notice that *Kates* would leave his money in the car when he disembarked therefrom. The company is on notice that each passenger will carry such articles of personal apparel and adornment as are usual in the station of life to which the passenger belongs, and as are appropriate to a journey. It is also put on notice that articles of personal apparel and adornment will be taken from the person during the night, and will not be restored until the toilet is made the following day. This is sufficient as a notice to require the company to use reasonable care to guard such effects of the passenger during the time that they will not be in his immediate control and in his actual custody. The declaration set forth a cause of action, and was sufficiently specific to put the company on notice of the character of the demand that it was called upon to defend.

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2. The motion for a new trial contained numerous special assignments of error. The extracts from the charge excepted to were not erroneous for any of the reasons assigned. The requests to charge, so far as legal and pertinent, were covered by the general charge, which fairly submitted every material issue to the jury. It only remains to consider the general grounds of the motion. The evidence authorized a finding that the plaintiff had lost the articles described in the petition, and that they were of the value therein alleged. It is said, though, that the plaintiff should not recover, for the reason that the evidence required a finding that the loss of the articles was the direct result of her own negligence in leaving them in the berth when she went to the toilet room. The character of the business that the sleeping car company is engaged in is such that it is necessarily charged with notice that, when a passenger rises from his berth in the morning, articles of apparel and adornment that will be upon his person during the daytime may be left in the berth, either intentionally or inadvertently, while the passenger is making his toilet; and at such time it is the duty of the company to take such precautions as are necessary to protect the passengers from loss by theft. It cannot be said, as a matter of law, that a passenger who leaves in his berth articles of apparel or adornment during the time that he is making his toilet in the morning is guilty of such contributory negligence as will defeat a recovery for their loss. Whether so leaving them would, in a given case, be such negligence as would defeat a recovery, would be a subject for decision by a jury, under all of the circumstances of the particular case. We are aware that in other jurisdictions it has been held that to so leave jewels and other articles of personal adornment in the berth would be such contributory negligence as would defeat a recovery; but in this state, where the question of negligence is one peculiarly for the solution of a jury, such rulings cannot be followed. The evidence authorized the verdict, and we see no reason for reversing the judgment.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SHELTON *v.* ERIE R. Co.

(Court of Errors and Appeals of New Jersey, March 26, 1907.)

[66 Atl. Rep. 403.]

Carriers—Expulsion of Passenger—Refusal to Pay Fare.*—The expulsion from a railroad train of a person who refuses to pay to the conductor any fare other than the tender of a limited ticket that on its face has expired is not actionable.

Same.†—This rule is not altered by the fact that the passenger has paid for such ticket the full rate for which the railroad company should have given him an unlimited ticket; nor does the communication of this fact to the conductor render the expulsion of the passenger for nonpayment of fare actionable.

Same—Terms of Ticket.‡—In the determination of a passenger's right to travel under a railroad ticket tendered by him to the conductor in payment of his fare, conclusive force is to be given to the intrinsic effect of such ticket to pay such fare as expressed on its face.

Error to Circuit Court, Essex County.

Action by Charles H. Shelton against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Cortland & Wayne Parker and Chauncey G. Parker, for plaintiff in error.

Authur H. Bissell, for defendant in error.

GARRISON, J. This suit is grounded upon the plaintiff's expulsion from a railroad train under the following circumstances: On December 17, 1903, the plaintiff being a passenger on the defendant's train from Mountclair to Upper Moutclair, a distance of $1\frac{3}{4}$ miles, tendered to the conductor in payment of his fare a ticket that bore date December 15, 1903, and read as follows:

*For the authorities in this series on the right to eject passengers for failure to present a valid ticket and refusal to pay fare, see foot-notes appended to *Missouri, etc., Ry. Co. v. Smith* (Ind. Ter. App.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688.

†For the authorities in this series on the subject of the duty of conductors to respect explanations of passengers as to cause of failure to have tickets or the proper tickets, see foot-notes appended to *Georgia Ry. & Elec. Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789.

For the authorities in this series on the subject of the liabilities of carriers on account of mistakes or negligence of their ticket agents, see foot-notes appended to *St. Louis, etc., R. Co. v. White* (Tex.), 20 R. R. R. 796, 43 Am. & Eng. R. Cas., N. S., 796.

‡For the authorities in this series on the subject of the admissibility of parol testimony to vary the contract purported to be expressed by the terms of a passenger ticket, see foot-notes appended to *Nickles v. Seaboard Air Line Ry. (S. Car.)*, 20 R. R. R. 755, 43 Am. & Eng. R. Cas., N. S., 755.

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"Good only for continuous passage Mountclair to Upper Mountclair beginning on day of sale or the next day." The ticket had been sold to the plaintiff on December 15th, and hence by its terms had expired. Upon being informed by the conductor that under the rules of the company the ticket could not be accepted for fare after the date of its expiration, the plaintiff refused to pay any other fare, and, when told that under the rules he must in that case leave the train, replied that he would not do so unless legal force was used. When the train reached the next station, the conductor placed his hand on the plaintiff's shoulder, and the two walked to the rear platform of the car, and when the train had stopped at the station the plaintiff stepped down on the bottom step from which before the train moved off he was given "a last push" by the conductor. For this expulsion the plaintiff brought his action in tort against the railroad company and recovered substantial damages.

Other facts are that the plaintiff had paid 10 cents for his ticket, for which price he should have been given a ticket that was not limited, that the limitation printed on the ticket was one the defendant could not lawfully impose, and that the limitation had not been noticed by the plaintiff. Whether tickets without such limitation were issued by the defendant and on sale at its ticket offices did not appear. The plaintiff also testified that he had with him 20 cents, the amount of the fare and excess fare demanded of him by the conductor, but that "he had paid the full price and refused to pay over again."

The right of the plaintiff to maintain his present action upon the foregoing facts is directly raised by assignments of error based on exceptions to the court's refusal to nonsuit the plaintiff or to direct a verdict for the defendant.

Upon the facts stated, it is entirely clear that whatever injury the plaintiff suffered at the hands of the defendant had its origin in the delivery to him by the ticket agent of a ticket that was limited as to the time when it must be used, whereas for the price that he paid he ought to have been given a ticket that was not so limited. It is equally clear that the present suit is not grounded upon this injurious act of the defendant or its ticket agent, but upon the conductor's denial of the plaintiff's right to travel upon the ticket that was presented to him, viz., a ticket that on its face negatived the right that was claimed under it by the plaintiff. The precise question, therefore, is whether a passenger who has been expelled from a train for refusing to pay his fare may maintain an action for such expulsion, if previously thereto he had tendered to the conductor a ticket that on its face was not receivable for his fare, provided that he had accompanied such tender with the true statement that he had paid for such ticket the full rate for which a proper ticket ought to have been issued to him. In still narrower form the question is whether the rule that permits the expulsion of a passenger who neither pays his fare nor tenders a ticket that shows his right to ride is abrogated or modified by the circumstances that were communicated to the conductor in the present case.

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While this question is one of first impression in this court, the underlying proposition that a passenger may lawfully be ejected for nonpayment of fare must be taken to be entirely established in this state. That "railroad companies are not bound to carry a passenger unless upon payment or tender of his fare, that they may in such case either refuse to permit him to enter the cars or having entered them they may require him to leave them before the termination of the journey, and that if he refuses to leave they may remove him at a suitable time and place using no unnecessary force"—were, more than half a century ago, treated by Chief Justice Green in *State v. Overton*, 24 N. J. Law, 437, 61 Am. Dec. 671, as unquestionable regulation. The criticism of this case in *Daniel v. New Jersey Street Railway*, 64 N. J. Law, 603, 46 Atl. 625, left untouched these basic propositions, which, indeed, are not now questioned anywhere.

In other jurisdictions for whose decisions we entertain the highest respect the question we are now called upon to decide has been passed upon in a large number of cases.

In a recent case in the federal Court of Appeals Judge Taft said: "The law settled by the great weight of authority * * * is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company." *Poulin v. Canadian Pacific Railroad Company*, 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800.

The Supreme Judicial Court of Massachusetts in *Bradshaw v. South Boston Railroad*, 135 Mass. 407, 46 Am. Rep. 481, held that "it is a reasonable practice to require a passenger to pay his fare or show a ticket, * * * and it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car upon his mere statement that he is entitled to passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but is bound to yield for the time being to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way."

In a later case (*Dixon v. New England Railroad*, 179 Mass. 242, 60 N. E. 581) the same court said: "The passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. A passenger may have a right to transportation between certain stations because of his connection with a certain ticket, and yet, if the ticket itself is not in order, a conductor is not bound to take it in payment of fare."

In *Stockdale's Case*, 83 Md. 245, 34 Atl. 880, the Court of Appeals of Maryland held that "in all cases when the question as to the right of a passenger to travel arises between him and the conductor of the train the ticket is unnecessarily the conclusive evidence of the nature and extent of the passenger's right."

"No other rule," said Judge Cooley in *Hufford v. Grand*

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Rapids Railway Company, 53 Mich. 118, 18 N. W. 580, "can enable the conductor to determine what he may or may not lawfully do in managing the train and collecting fares." And on another occasion the same court held that, "when a passenger receives a defective ticket from an agent of the company by reason of the mistake or negligence of the agent, the conductor may refuse to accept such ticket, and is authorized to compel the passenger to leave the train if payment of fare is refused."

The New York Court of Appeals in *Monnier v. New York Central & Hudson River Railroad Company*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619, said: "A person who becomes a passenger in a public conveyance must subordinate his conduct to all rules that are reasonable and valid. The simple duty of the conductor is to execute and enforce all reasonable rules, and that of the passenger is to obey them. If there is some fact or omission behind the rules not apparent upon the face of the transaction, the passenger must resort to some other remedy for his grievance besides the use of force against the conductor, and, if under such circumstances he invites a personal collision with the officer in charge of the train resulting in his forcible expulsion, he puts himself in the wrong, and cannot sue the company or the officer for assault and battery."

In *Kiley v. Chicago City Railway Company*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460, the Supreme Court of Illinois held that "the conductor was ordered by his superior not to receive a ticket like the one presented. This order he was bound to obey, and, when the passenger was notified by the conductor that his ticket was not good and would not be received, it was his duty to leave the train in a peaceable manner, and hold the company responsible for the consequences. * * * The passenger should seek redress in the courts, where he will find a complete remedy for every indignity offered and for all damages sustained."

The Supreme Court of Michigan in *Brown v. Rapid Railway Company*, 134 Mich. 591, 96 N. W. 925, held that "the rule of law in this state has been settled that, as between the conductor of a railway train and the passenger, it is incumbent upon the passenger to produce as a ticket one which is apparently good on its face, or pay the fare in cash, and that, failing to do this, the conductor has the right to eject the passenger from the car."

In *McKay v. Ohio River Railroad Company*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913, the Supreme Court of Appeals of West Virginia said, "if a passenger pay a railroad agent fare for a certain trip, and by mistake of the agent is given a ticket not answering for that trip but one in an opposite direction, and the conductor refuses to recognize such ticket, and demands fare, which the passenger fails to pay, ejection of the passenger from the train without unnecessary force will not be a ground of action against the company as a tort."

The Supreme Court of Alabama in *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 797, held that, "as to the right of a conductor

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to eject a passenger who is found riding on a train on a ticket void on its face, it is proper to say, and we may announce without elaboration as the proper conclusion sustained by the great weight of authority, that the ticket is the sole and conclusive evidence to the conductor of the passenger's rights as such to be on the train, * * * and when it is void on its face, in default of payment of fare he may deny the right of the passenger to ride on such ticket and expel him in a proper manner from the train."

These cases and a host of others that might be cited concur in holding the general doctrine that the expulsion by a conductor of a passenger who neither pays his fare nor tenders a ticket that evinces his right to carriage is in the absence of unnecessary force not actionable. 6 Cyc. 551; 5 Am. & Eng. Ency. 594; 28 Am. & Eng. Ency. 156; 4 Elliott on R. R. § 1594.

To the doctrine thus stated we yield entire assent. Many of the cases cited, however, by reason of the facts involved, or by force of the line of reasoning pursued, go further than we are required to go in the decision of the present case. In order, therefore, that there may be no uncertainty as to the scope of our decision and the ground upon which it rests, it is deemed best that such ground be explicitly stated.

Railroad companies as they exist in this country are corporations in which private capital is embarked in public; i. e., common carriage. These corporations possess, therefore, a dual nature, having in trust on the one hand the financial interests of their stockholders, and, on the other, the convenience and safety of the traveling public. The two agents of these corporations with which alone the public comes in contact, viz., the ticket agent and the train conductor, represent roughly these two corporate capacities.

Hence the transaction by which a traveler purchases a ticket from one of these agents for presentation to the other is likewise of this same dual nature, and involves an observance on the part of the passenger of all reasonable regulations established for the conduct of each of these departments. These regulations are simple, uniform, and well understood by the public. The ticket agent sells tickets for cash. He cannot give credit. His authority over the business of his company is limited to the issuance of such tickets as have been placed in his hands for that purpose, as incidental to which he may hand out time tables and give such information to prospective passengers as may aid them in the selection of the tickets they require; i. e., tickets that will pay the fare between the points they designate. The obligation of the company with respect to the acts of this agent is that he shall deliver to passengers the tickets for which they ask and pay. If this is not done, whether the fault be that of the agent or the company this obligation is broken, and the company is liable for the damages that result therefrom. The case before us is an illustration of such a breach.

The agency of the train conductor is even more limited for it is all comprised in his duty to collect a fare from every passenger or to eject him from the train.

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The fare thus to be collected by the conductor may be a cash sum or it may be a ticket; that is for the passenger to determine. If the passenger proposes to pay in cash, he must be provided with and tender to the conductor a sum that under the established rules of the company is sufficient to pay his fare. If he proposes to pay by ticket, he must be provided with and tender a ticket that under the established rules of the company has intrinsic effect of paying such fare. This intrinsic attribute of the ticket is the essential quality to which it owes its efficiency. It is the possession of this attribute that distinguishes a ticket from a contract, on the one hand, and from a mere instrument of evidence, on the other. And I may say here that the failure to emphasize this essential feature of a railroad ticket is the chief reason for our unwillingness to place our decisions solely upon the authority of the cases that have been cited, in most, if not all, of which the efficiency of such ticket is referred in a somewhat vague way to a hypothetical contract, the precise nature of which is necessarily involved in obscurity.

That this essential attribute of a railroad ticket did not escape the acute observation of Chief Justice Beasley is evident from his careful description of such a document in the opinion delivered by him in *Petrie v. Pennsylvania Railroad*, 42 N. J. Law, 449. "The plaintiff," he said, "had a passenger ticket, issued by the defendant, which on its face and according to its intrinsic effect did not authorize him after having stopped at a place intermediate the designated termini to use it for the purpose of continuing his journey." This language, which might well stand as a definition, not only recognizes that a railroad ticket has the intrinsic effect expressed on its face, but also that it may have an intrinsic effect that is not so expressed. This is a valid distinction, since it marks the difference between inspection and interpretation as modes for determining the effect, to be given to passports of this nature. The implication is that such effect, when not expressly stated, is to be gathered from the well-known customs of the business of which the ticket forms a part. A postage stamp is a good illustration of such mode of interpretation, or, still better, a special delivery stamp. Nothing on the face of these documents expressly states the effect of either of them, but the well-known custom of which they are a part interprets them to the public and to postal agents alike. Theater tickets afford another familiar example, especially the return checks issued during a performance, which, though they may contain only the advertisement of some business house, are interpreted by custom to secure the return of the holder to the theater on the night of their issue. Upon a far more extensive scale promissory notes became early in the history of English law subject to be interpreted solely by the business customs of merchants. Whether I am correct or not in these views as to the interpretation of railroad tickets is, however, of no immediate importance, since in the present case the plaintiff's ticket called for no interpretation, for the reason that is expressed on its face the intrinsic effect to be given to it. The subject, which is one of great

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importance, is discussed at length and in a most suggestive way by Prof. Beale in an article on "Tickets," in volume 1 of the *Harvard Law Review*, p. 20.

For present purposes, we need to go no further than to say that in the determination of right to travel under a railroad ticket tendered as fare conclusive force is to be given to the intrinsic effect of such ticket as expressed on its face. Such was the force given to it by Chief Justice Beasley in the case just cited, and by Mr. Justice Van Syckel in *Spiess v. Erie Railroad Company*, 71 N. J. Law 90, 58 Atl. 116, where the judgment was reversed because the lower court had left it to the jury to say "whether the plaintiff believed he had a right to use the ticket." Such was the force accorded to the ticket in *Rogers v. Atlantic City Railway Company*, 57 N. J. Law, 703, 34 Atl. 11, where Mr. Justice Lippincott, speaking for this court, said: "The ticket is the conclusive evidence of the contract of carriage upon which the conductor had the right to rely," and in the recent case in this court of *McDonald v. Central Railroad Company*, 72 N. J. Law, 280, 62 Atl. 405, 2 L. R. A. (N. S.) 505, 111 Am. St. Rep. 672, which was a time-table case, and not one of the nonpayment of fare, the decision that the plaintiff's expulsion was unlawful was entirely consistent with the face of his ticket.

This intrinsic effect of a railroad ticket was also recognized in the opinion of Chancellor Magill in this court in the case of *Pennsylvania Railroad v. Parry*, 55 N. J. Law. 551, 27 Atl. 914, 22 L. R. A. 251, 39 Am. St. Rep. 654, when he said, "The ticket is a mere token that fare has been paid, and that the passenger has the right to be carried to the destination it indicates according to the reasonable regulations of the railway company," for a token is a symbol that betokens something, i. e., that carries within itself that which it signifies, which is in effect a paraphrase of the significant term in Chief Justice Beasley's description.

The only case in our courts as far as I can discover that is out of harmony with these views is *Perine v. North Jersey Street Railway Company* decided in the Supreme Court and reported in a per curiam in 69 N. J. Law, 230, 54 Atl. 799. In that case the passenger tendered a transfer ticket that under the rules of the defendant had expired, and was rejected for refusing to pay a fare. The question we are now considering was therefore squarely raised. Judgment in favor of the plaintiff was sustained solely upon the authority of *Consolidated Traction Company v. Taborn*, 58 N. J. Law, 1, 32 Atl. 685. The *Taborn Case*, however, was not an authority for the proposition for which it was thus cited, and has no bearing upon the question we are considering. In the *Taborn Case* the plaintiff was expelled because she had no ticket; hence neither the intrinsic effect of a ticket nor its proper interpretation could possibly arise. What the *Taborn Case* held was that, where the company for its own convenience had established a custom of transferring its passengers to another car because of a temporary break in its road, a change of rules promulgated without notice on the very day the plaintiff was expelled was as

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to her an unreasonable regulation. The Perine Case was therefore unsupported by the only authority cited for that purpose, and, being, as we think, erroneously decided, must be deemed to be overruled by our present decision.

In the light of the foregoing considerations, the grounds for our adoption of the rule that the fare of a railway ticket, when it speaks upon the subject, is conclusive upon its sufficiency as a railroad fare, should be clear. That this rule, although upon somewhat variant grounds, is established elsewhere by the great weight of authority, was stated at the outset of our consideration of subject.

In the citation of cases then made there was an intentional omission of those cases that hold the opposite view, and for this reason, viz., that such cases are without exception as far as my examination goes, based upon one or the other of two radically unsound propositions, according to which they may be conveniently grouped for criticism.

By far the greater number of the cases thus referred to proceed upon the idea that the delivery of a wrong ticket by the ticket agent or the giving of misleading information establishes a contractual right between the injured passenger and the railroad company, for the breach of which the train conductor must afford redress upon a summary investigation. The fundamental fallacy of this position is that it assumes the authority of ticket agents to make contracts for railroad companies. The authority of such agents is notoriously limited to the sale of tickets and to the doing of acts that are ancillary thereto. By no rule of the law of agency or of evidence can the acts or statements of a ticket agent beyond the scope of his limited authority be erected into a contract binding upon the railroad company. What has been mistaken for this authority to make contracts is the ability of these agents to make trouble for their companies by their negligence in the delivery of tickets, or mistakes in giving information. For injury resulting from these acts of the ticket agents their principal may, as we have already seen, be held liable in an appropriate action.

The judicial conclusions that have been constructed on this erroneous foundation do not in any way commend themselves to us.

The other proposition that has been characterized as unsound is that the purchase of a ticket by a passenger is the payment of his fare. Such was the precise claim of the plaintiff in the present case. The fallacy of this proposition must be apparent. It is one of fact. Payment of fares is made to the conductor alone. This is true whether such fare be by cash or by ticket. Ticket agents do not collect or receive fares. They issue tickets. A fare is a payment that is made when the right of carriage is claimed. The very word "fare" originally meant "journey." Webster's International Dictionary. Such is still in connotation.

When a ticket is accepted by the conductor, it becomes a fare, but not before. In the case of *P. R. R. v. Parry*, above cited, the plaintiff's ticket had been accepted as fare for part of his return

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trip; hence the statement (McGill, Ch., *ubi supra*) that it was a token that fare had been paid strictly correct.

The failure to observe this distinction has resulted in a line of decisions which, while recognizing the right of the conductor to expel a passenger for nonpayment of fare, hold that the company is liable for such expulsion if in point of fact, to use the language of these cases, "the passenger has paid his fare to the ticket agent." Extended comment upon this line of reasoning is believed to be unnecessary.

Our conclusion upon the whole case is that the plaintiff was lawfully expelled from the train for nonpayment of fare, and that for such expulsion no action can be maintained. The facts upon which this conclusion rests having all appeared at the close of the plaintiff's case, the motion for nonsuit then made should have been granted. The judgment must therefore be reversed.

In the preliminary statement of the plaintiff's case the limitation placed upon his ticket was said to be one that it was not lawful for the railroad company to impose. That statement embodied the decision we had reached upon a question raised by the railroad company touching the constitutionality and construction of the thirty-eighth section of the general railroad law (P. L. 1903, p. 665), which reads as follows:

"Any railroad company may demand and receive such sums of money for the transportation of persons on its railroads and connections, and for any other services connected with the business of transportation of persons on or over said railroad or to or from the same, as it shall from time to time think reasonable and proper, not exceeding in the case of railroad companies organized under this act, three cents per mile for carrying each passenger on such railroad and not exceeding in the case of railroads constructed or operated under a special charter, three and a half cents per mile for carrying each passenger on such railroad, and not exceeding the rate per mile limited by the charter, but no charge shall be required to be less than ten cents; tickets for passengers, except excursion tickets or tickets sold at reduced rates shall be good until used; tickets sold at less than the rates herein limited shall be good and shall entitle the holder to passage for a limited number of days only after the date of issue thereof, which limit shall be clearly stated and set upon the ticket; any railroad company owning or operating a railroad may collect an excess of ten cents over the established rate of fare from any passenger who pays his fare on the train, giving him a receipt therefor, which shall entitle the holder to have such excess refunded upon presentation at any ticket office of the company on the line of its railroad."

The argument for the company was that the charter of the Montclair Railroad Company under which the plaintiff in error was operating authorized a charge of eight cents per mile; hence, it was contended the ticket in question was issued at a reduced rate and might lawfully be limited. This argument rests upon the contention that the foregoing section of the general railroad law is either unconstitutional or has no application to the case. Neither of these claims is in our opinion well founded.

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That the Legislature could by an appropriate enactment alter the charter of the Montclair Railway Company seems to be clear. *Montclair v. New York & Greenwood Lake R. R. Co.*, 45 N. J. Eq. 436, 18 Atl. 242; P. L. 1885, p. 324.

This being so, we think that section 38 of the general railroad law is not rendered unconstitutional by reason of the provision that railroads constructed and operated as the plaintiff in error is under a special charter are permitted to charge one-half cent more per mile than railroads organized under the general act are permitted to charge. The argument is that this discrimination which in itself is favorable to the plaintiff in error is based upon an illusory classification. The classification is "railroad companies organized under this act, viz., the general railroad law," and "railroads constructed and operated under a special charter." The former of these classes is rendered general for purposes of railroad legislation by section 88; hence it must follow that the residue left after subtracting this general class from the entire class is also general for the like purpose. *Point Breeze Ferry Co. v. Bergen Neck R. R. Co.*, 53 N. J. Law, 108, 20 Atl. 762.

The contention that the words "good until used" does not mean good "for passage" is in our judgment entirely untenable.

Having reached the conclusion that section 38 of the general railroad law was constitutional, that it applied to the plaintiff in error, and that its effect was to render unlawful the limitation placed on the ticket that was delivered to the plaintiff below, we embodied such result in our original statement of facts, and have throughout the discussion of the case given it consideration in so far as it bore upon the legal question at issue.

For the reasons already stated, the judgment of the circuit court is reversed.

ST. LOUIS, I. M. & S. RY. CO. *v.* PITCOCK.

(Supreme Court of Arkansas, April 8, 1907.)

[10 S. W. Rep. 725.]

Carriers—Free Pass—Exemptions—Negligence—Validity.*—Under Const. art. 17, § 12, making railroads responsible for damages under such regulations as may be prescribed by the Legislature, and Kirby's Dig. § 6773, making railroads responsible for damages to persons caused by the running of trains, a stipulation in a free pass that the passenger accepting it assumes the risk of accidents is contrary to public policy, and the passenger injured through the negligence of the carrier is entitled to recover therefor.

*See foot-note appended to *Northern Pac. R. Co. v. Adams* (U. S.), 10 R. R. R. 575, 33 Am. & Eng. R. Cas., N. S., 575; foot-notes appended to *Nickels v. Seaboard Air Line Ry.* (S. Car.), 20 R. R. R. 755, 43 Am. & Eng. R. Cas., N. S., 755; *Weaver v. Ann Arbor R. Co.* (Mich.), 16 R. R. R. 603, 39 Am. & Eng. R. Cas., N. S., 603.

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Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by John H. Pitcock against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Oscar L. Miles, for appellant.

Sam R. Chew, for appellee.

WOOD, J. The conceded facts are that appellee was riding upon appellant's passenger train from Little Rock to Alma, Ark.; that while so riding he was injured through the negligence of appellant, and the amount of the damages as found by the jury was not excessive. Appellee did not pay any fare for transportation, but accepted from appellant a free pass which was indorsed as follows: "The person or persons accepting this pass assumes all risk of accidents and damages without claim upon the company." He accepted transportation on this pass, with full knowledge of the above indorsements, preferring to use the pass, rather than to purchase a ticket which contained no limitations upon appellant's liability.

Appellant contends that it is not liable because appellee accepted a pass which provided that: "The person or persons accepting this pass assumes all risk of accidents and damages without claim upon the company." We are of the opinion that this provision was intended by appellant to exempt it from liability for accidents caused by the negligence of the company's agents. For unavoidable accidents it would not be liable anyway, and the case is the same in legal effect as if the clause had contained the words "whether caused by negligence of the company's agents or otherwise." We do not agree with counsel for appellee that the cases of *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 44, 24 Sup. Ct. 408, 48 L. Ed. 513, and *Boering v. Chesapeake Beach Ry. Co.*, 24 Sup. Ct. 515, 193 U. S. 442, 48 L. Ed. 742, have no application because of the difference of the wording of the exempting clauses in the pass in those cases and the one at bar. The clauses are in legal effect the same, and the cases are directly in point. The only question for us to determine is whether or not we will follow those cases. In the first of the above cases, Mr. Justice Brewer concludes the opinion as follows: "The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge, if he would assume the risk of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit. and free passengers are

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not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby." In the last of above cases, Judge Brewer also writes the opinion, and concludes as follows: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." In the first opinion, the learned justice cites a number of decisions of state courts, and decisions also of the Court of Queen's Bench that support the doctrine announced. He also cites a number of decisions of state courts holding the contrary doctrine. Since there is this diversity of opinion, we feel that we should adopt that view most in accord with our own Constitution and statutes, that which comports logically with our own decisions, which conserves a sound public policy, and reflects our own sense of right and justice.

Our Constitution provides that all railroads operated in this state shall be responsible for all damages to persons and property under such regulations as may be prescribed by the General Assembly. Article 17, § 12. Section 6773, Kirby's Dig., provides that: "All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." Strictly and literally construed, under these provisions railroads would be liable for all damages to persons and property, whether caused through the negligence of the company or otherwise. But this court has construed these provisions of the law to mean that railroads are liable only in cases where they have been guilty of some actionable negligence. *L. R. & Ft. Smith Ry. Co. v. Eubanks*, 48 Ark. 467, 3 S. W. 808, 3 Am. St. Rep. 245; *L. R. & Ft. Smith Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55. As carriers of passengers they are not liable for unavoidable accidents. This court has also held that the railway company is not liable to the party injured, where the latter's "own negligence or willful wrong contributed to produce the injury of which he complains, so that but for his co-operating and concurring fault the injury would not have happened to him. *L. R. & Ft. S. Ry. Co. v. Pankhurst*, 36 Ark. 371; *St. Louis, I. M. & Sou. Ry. Co. v. Freeman*, 36 Ark. 41; *Railway Co. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *St. L., I. M. & Sou. Ry. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070. Unavoidable accidents and contributory negligence of the injured party are the only limitations or exceptions thus far recognized and allowed by this court to the constitutional and statutory provisions making railroads liable for all damages to persons or property done or caused by the running of their trains.

This court holds that railroads, as common carriers of goods, cannot exempt themselves by contract from losses and damages caused by their own negligence. *Taylor, Cleveland & Co. v. L.*

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R. M. R. & Texas R. Co., 32 Ark. 393, 29 Am. Rep. 1; Taylor & Co. v. L. R. Miss. R. & Texas Ry. Co., 39 Ark. 148; L. R. Miss. R. & Texas Ry. Co. v. Talbot, 39 Ark. 523. We hold that a railway company, as master, cannot exempt itself by contract from liability to its servants for injuries caused by its negligence in failing to provide a safe place to work, and safe machinery, materials, and tools with which to operate. L. R. & F. S. Ry. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 230. In *Railway v. Eubanks*, *supra*, the court, in passing upon the validity of the contract in which the servant agrees to assume all the risks of his employment and to exempt the company from liability "for any injury or damage he may sustain," uses the following language, which is pertinent to the case at bar: "A common carrier or a telegraph company cannot, by precontract with its customers, relieve itself from liability for its own negligent acts. This, however, may be on the grounds of its public employment." Again: "It is an elementary principle in the law of contracts that 'modus et conventio vincunt legem'—the form of the agreement and the convention of the parties override the law. But the maxim is not of universal application. Parties are permitted by contract to make a law for themselves only where agreements do not violate the express provisions of any law nor injuriously affect the interests of the public. Our Constitution and laws provide that all railroads operated in this state shall be responsible for all damages to persons and property done by the running of trains. This means that they shall be responsible only in cases where they have been guilty of some negligence, and it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy." These decisions are grounded upon the principle that it will be detrimental to the public interest to permit railway companies by private contract to escape a duty which is imposed upon them by law, namely, to respond in damages to every one who may be injured through their negligence. In other words, that it contravenes public policy for railroad corporations to buy immunity from liability which the law imposes upon them by extending favors as a gratuity, or, for a reduced or a nominal consideration, to those who may chance to be injured through their negligence. The reasons for the application of the doctrine may be more obvious and cogent in the cases of carriers of goods and master and servant, already decided by this court; but, notwithstanding the difference in facts, the same doctrine is applicable here, and it is but in line with the language and logic of these previous decisions to so hold. The principle upon which the rule is invoked in all these cases is well stated in the case of *Louisville, etc., Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869: "A stipulation that the carrier shall not be bound to the exercise of care and diligence is, in effect, an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself

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from liability by a stipulation in his contract with the passenger that the latter should take the risk of the negligence of the carrier or his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void."

We cannot agree with the court and the learned justice who wrote its opinions in *Railway v. Adams*, and *Boering et al. v. Railway*, *supra*, that "no public policy was violated" by a contract like the one under consideration, and that to so rule but conforms the law "to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." That view ignores the duty to the public which railroad corporations virtually undertake to perform when they receive their charters. By virtue of these, they have vast privileges of monopoly in transportation, and the absolute right of eminent domain. They owe, in turn, the duty to exercise ordinary care, which, in the case of passengers, is the highest degree of care that a person of ordinary prudence would exercise, consistent with the mode of conveyance and the proper conduct and management of the business, to see that their passengers are furnished safe and comfortable transportation. They cannot escape this duty. They cannot buy immunity from liability for a failure to discharge it by reduced fare or free transportation. The passenger cannot relinquish the rights which the law gives him in consideration of gratuitous passage. It is not a question of benevolence and hospitality on the part of the carrier in giving, nor the violation of moral obligation on the part of the passenger in receiving, without being bound by the terms of the agreement upon which the gratuity was offered and accepted. The question is one of public duty which the state as *parens patriæ*, having due regard for the lives and limbs of all her subjects, will not permit to be relegated to the domain of private contract. The interest which the commonwealth has in the comfort and safety of her citizens, to see that they are protected from injuries resulting through the negligence of the public carrier or his servants, is the same, whether such citizen be a gratuitous passenger or a passenger for hire. As is well said by the Supreme Court of Minnesota, in *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360: "The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. * * * While it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility the

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greater the care, and that any relaxation of responsibility is dangerous." Other authorities in support of the rule announced are collated in 6 Cyc. 544, note 59. See, also, 4 Ell. R. R. § 1608, notes pp. 2514, 2515. See, also, the comparatively recent case of Yazoo & M. V. R. Co. v. Grant, 38 South. 502, 86 Miss. 565, 109 Am. St. Rep. 723, decided since the decisions of the Supreme Court of United States, *supra*, and referring to them.

Affirmed.

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(Supreme Court of Appeals of West Virginia, April 17, 1907.)

[57 S. E. Rep. 279.]

Writ of Error—Record—Authentication—Bill of Exceptions.—A paper, entitled "Bill of Exceptions," signed and sealed by the judge of the court, and bearing the style of the case in which an order has been entered, stating that a bill of exceptions was tendered, signed, sealed, and made a part of the record, is sufficiently identified to make it a part of the record.

Same—Incorporation of Evidence.—A certificate of evidence, marked for identification in a particular manner, and referred to as having been so marked in a bill of exceptions, which says "the plaintiff, to maintain the issue upon his part, introduced before the court and jury the following witnesses, who testified as follows: Here read evidence transcribed by stenographer, certified by her and for identifications marked [giving the mark found on the certificate], and this was all the evidence offered, either by the plaintiff or the defendant, upon the trial of this case," is sufficiently incorporated in the bill of exceptions, in a legal sense, and identified, to make it a part thereof.

Carriers — Passengers — Contract — Evidence.* — A street railway ticket or transfer check, in the hands of a purchaser thereof for use on the car lines of the company issuing it, constitutes the complete evidence of the contract between the purchaser and the company, and the privileges evidenced by its terms are not subject to limitation by a mere rule of the company, knowledge of which the purchaser did not have, and could not conveniently have ascertained.

Same—Ejection—Damages.†—Ejection of the holder of such ticket

*For the authorities in this series on the subject of the validity of a carrier of passengers' rules and regulations; see foot-notes appended to Illinois Cent. R. Co. v. Allen (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49; Knoxville Traction Co. v. Wilkerson (Tenn.), 22 R. R. R. 763, 45 Am. & Eng. R. Cas., N. S., 763.

For the authorities in this series on the subject of street railway transfers, see foot-notes appended to Georgia Ry. & Elec. Co. v. Baker (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789; Cleveland City Ry. Co. v. Conner (Ohio), 20 R. R. R. 649, 43 Am. & Eng. R. Cas., N. S., 649.

†For the authorities in this series on the subject of the damages

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or transfer, by a conductor or other officer, from a car of the company by which it was issued, contrary to the terms thereof, and refusal to carry him, on his failure and refusal to pay an additional fare, is actionable, and the measure of damages is such sum as the jury believe the plaintiff entitled to recover, provided the amount be not so large or small that the action of the jury in awarding it must be attributed to passion, partiality, corruption, prejudice, or some mistaken view of the case.

Writ of Error—Disposition of Cause—Remand to Trial Court.—On reversing and setting aside an order, granting a new trial, on a writ of error perfected before the new trial was had, the appellate court will not render judgment on the verdict reinstated by its action on the writ of error, if the rendition of a final judgment in the court below, on a second verdict, obtained after the writ of error was perfected, be brought to its attention. Under such circumstance, the case will be remanded, for judgment by the court below, on the verdict reinstated by the appellate court, to the end that there may not be in force two judgments at the same time on one cause of action.

Same—Effect of Transfer of Cause—Jurisdiction of Appellate Court—Subsequent Proceedings in Trial Court.—The acquisition of a second verdict and judgment thereon, under such circumstances, does not deprive the appellate court of its jurisdiction, nor constitute a settlement and adjustment of the controversy, barring prosecution of the writ of error.

(Syllabus by the Court.)

Error to Circuit Court, Cabell County.

Action by William J. De Board against the Camden Interstate Railway Company. From an order granting a new trial after verdict in favor of plaintiff, he brings error. Reversed and remanded.

Isbell & Perry, for plaintiff in error.

Vinson & Thompson, for defendant in error.

POFFENBARGER, J. In an action of trespass on the case for damages, for wrongfully refusing to carry him on its street car, and ejecting him therefrom, William J. De Board obtained, in the circuit court of Cabell county, a verdict against the Camden Interstate Railway Company, for the sum of \$300, which the court, on the motion of the defendant, set aside. Under clause 9 of section 1 of chapter 135 of the Code of 1899 (section 4038, Code 1906), allowing, in any civil case, where there is an order granting a new trial, an appeal from such order, De Board obtained a writ of error.

recoverable against a carrier for refusal or failure to transport a passenger, or delay in transporting him, see foot-notes appended to *Sappington v. Atlanta & W. P. R. Co. (Ga.)*, 22 R. R. R. 846, 45 Am. & Eng. R. Cas., N. S., 846; foot-notes appended to *Louisville & N. R. Co. v. Fowler (Ky.)*, 21 R. R. R. 299, 44 Am. & Eng. R. Cas., N. S., 299.

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As the verdict was set aside under the impression that the evidence did not sustain it, or that it was contrary to the evidence, the assignment of error involves a consideration of the evidence, and the point is made, in the brief filed for the defendant in error, that the evidence has not been made part of the record. The order, purporting to make the bill of exceptions part of the record, is the final order in which the verdict is set aside, and a new trial allowed. The portion thereof which relates to the bill of exceptions reads as follows: "Be it remembered that upon the trial of this case, after the jury was sworn, and before they had retired, and during the progress of the trial, the plaintiff objected and excepted to certain rulings, opinions, and actions of the court, made during the trial, and tendered his bill of exceptions thereto marked 'Exceptions, De Board v. Camden Interstate Railway Company, certificate of evidence,' and prayed that the same be signed, sealed, and made a part of the record therein, which is accordingly done." What purports to be a bill of exceptions is printed in the record under the following heading: "Bill of Exceptions. William J. De Board v. Camden Interstate Railway Company, a Corporation. Trespass on the Case." It is what is known as a skeleton bill of exceptions, and so much of it as relates to the evidence reads as follows: "The plaintiff, to maintain the issue upon his part, introduced before the court and jury the following witnesses, who testified as follows: Here read evidence transcribed by stenographer, certified by her, and for identification marked 'De Board v. Railway Company. Certificate of Evidence.' And this was all the evidence offered, either by the plaintiff or the defendant, upon the trial of this case." Following the bill of exceptions appears what purports to be the evidence in the case under the caption, "De Board v. Railway Company. Certificate of Evidence." Immediately after this caption appears the style of the case in the following terms: "William J. De Board v. Camden Interstate Railway Company. On Appeal." The order purporting to make a bill of exceptions part of the record was entered on the 9th day of February, 1906. The certificate of the stenographer to the evidence bears date February 14, 1906.

It is insisted that the bill of exceptions does not answer the descriptive terms of the order. It bears the style of the case, and is signed and sealed by the judge of the court. Many decisions of this court require in the order a description sufficient to identify the paper referred to. Different methods of accomplishing this in common use by members of the profession and the courts, such as marking the bill by a number, a letter, or a name, have been mentioned and approved; but no particular mode of identification has ever been required. It suffices that a comparison of the bill of exceptions with the description given in the order makes its identity certain. What degree of certainty is required has never been very clearly defined; but it is difficult to see any reason for mere technical requirements. If there be mere trifling inac-

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curacies, such as reason demands must be due to nothing more than inadvertence, while the paper, in all material and substantial particulars, comes within the terms used so fully as to convince and satisfy any reasonable person that it is the paper referred to, the ends of justice would not be subserved by the rejection thereof. *McKendree v. Shelton*, 51 W. Va. 516, 41 S. E. 909, sustains this view. In determining what is deemed to be a part of a bill of exception, this court said: "It must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions." The later cases of *Tracey v. Coal Co.*, 57 W. Va. 587, 50 S. E. 825, *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100, *Parr v. Currence*, 58 W. Va. 523, 52 S. E. 496, *Railroad Co. v. Joyce*, 58 W. Va. 544, 52 S. E. 498, and *Woods v. King*, 59 W. Va. 418, 53 S. E. 605, have not qualified this rule in any respect. We think the bill of exceptions is sufficiently identified to be a part of the record.

It becomes necessary now to determine whether the certificate of evidence is a part of the bill of exceptions. The bill of exceptions says, "The plaintiff, to maintain the issue upon his part, introduced before the court and jury the following witnesses, who testified as follows," and then directs the insertion of the evidence as transcribed by the stenographer, certified by her and for identification marked "*De Board v. Railway Company. Certificate of Evidence.*" Turning to what is relied upon as the certificate of evidence, we find the caption thereof to correspond exactly with the means of identification set forth in the bill of exceptions. Nevertheless, it is said that the bill does not show that the evidence is annexed to it and made a part thereof. The phraseology employed in a bill of exceptions, in an attempt to make another paper a part of it, is immaterial, if the terms used logically do so. To require the bill to say, in so many words, the evidence hereto annexed or bearing certain marks is made a part hereof, would sacrifice substance to mere form, for that language would not be more certain or effective than the language employed in the bill under consideration, which says the witnesses introduced testified as follows, and then directs the insertion of the testimony, embodied in a paper, so marked and described as to leave no room for any mistake concerning it. When certain words, employed for the purpose of identification, are apt and well calculated to achieve that purpose, indicating the very nature of the thing which it is proposed to incorporate by means thereof, as well as identifying it, there is no presumption that there are other things bearing the same descriptive marks. On the contrary, all the decisions in which this method of identification has been approved and recommended deny such presumption. The evidence rejected in *McKendree v. Shelton*, for want of means of identification, bore no mark of identification. The commissioner's report, which was made a part of the bill of exceptions, did not even refer to the

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depositions, and the depositions were not themselves signed by the witnesses. Judge Brannon, delivering the opinion of the court, said he had no doubt that the commissioner's report and the exception and the affidavits mentioned in the bill of exceptions could be treated as parts of it; but he said there was a great volume of unsigned depositions not certified by the commissioner as having been taken by him nor referred to by him in his report. There was a reference to them in the bill of exceptions, but the bill contained nothing by which they could be identified. The views expressed in that case form the basis of all that has been said in subsequent cases, concerning the requirement, in a bill of exceptions, of language purporting to make other papers part of it, and the specification in it of means of their identification. That the transcript of evidence referred to in the bill of exceptions is both identified by the bill of exceptions, and legally, though not actually, incorporated in it, is clear beyond the shadow of a doubt. That the certificate thereto bears a later date than that of the order by which the bill of exceptions was made part of the record cannot prevail over the solemn order of the court, declaring the paper to have been made part of the record. It must be attributed to clerical inaccuracy or inadvertence, for it cannot overthrow the solemn order of the court, saying it was made part of the record on the 9th day of February, 1906.

The railway company operated street car lines on Third avenue and Fourth avenue of the city of Huntington. What connection these two lines had is not clearly shown, but transfers were given by the conductors on the Third Avenue line which were good for passage on the Fourth Avenue line, if presented within one hour from the time of their issuance, shown by punch marks in the margin thereof. The plaintiff, an employee in the American Car & Foundry shops, situated in the eastern end of the city, took passage on a Third Avenue car going west, paid his fare, and took a transfer from the conductor. Having crossed over to Fourth avenue and waited a few minutes, he observed a car standing below Ninth street and started down to it. Before he arrived, the car moved on, and he walked on after it until another car came down, which he boarded, and handed the conductor the transfer. He was informed by the conductor that the transfer was not good for a passage on the car, although presented within an hour after the time at which it had been issued because it was tendered below a place known as "Johnson's Lane." He refused to pay any additional fare, and was ejected from the car. He resisted removal, and the conductor rang for the motorman, who came back with a crank in his hand, with which he struck the plaintiff across the knuckles to make him let loose of the bar to which he was clinging.

So much of the transfer as is material reads as follows:

Free Transfer.

Good only as indicated, if presented within one hour from time and date punched in margin—not transferable—and is accepted by passen-

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ger upon condition that the Company is not responsible for any error upon the part of the conductors in punching time and dates.
Camden Interstate Railway Co.

Examine your transfer carefully.
Issued by Conductor No. 71.
Going west on Fourth Avenue
From 6th and 8th Avenue.
From 3d Avenue.

A. M.												P. M.											
1	2	3	4	5	6	7	8	9	10	11	12	1	2	3	4	5	6	7	8	9	10	11	12
15											15	15											15
30											30	30											30
45											45	45											45

It does not disclose any such limitation as to the place at which it must be used as was enforced by the conductor. It appears from the testimony of a witness for the defendant that there was a rule forbidding its acceptance below Johnson's Lane, posted, among others, in the defendant company's barn, to which the public were not admitted.

The plain and undisputed state of facts, shown by the evidence, renders it unnecessary to consider many of the principles of law applicable to the rights of passengers and common carriers, respectively, growing out of contracts for carriage. On the face of the transfer but one limitation appeared, namely, that it should be used within one hour after the issuance thereof. If presented within that time, on the face thereof, it entitled the holder to a westward passage on any car of the company running on Fourth avenue. There is no evidence tending in the slightest degree to show that the plaintiff had any knowledge of any limitation upon that right. According to all the authorities, a paper so handed him, without any explanation, or any knowledge on his part of any limitation, constituted the contract between him and the company. Unlike steam railroads, street railways do not have a certain fare for passage between given points. The nature of their business is such as to compel them, for the most part, to charge a certain fare for a passage without reference to the distance; this, at least, was the method of the defendant company. The paper, on its face, therefore, entitled the plaintiff to carriage, and knowledge of a secret limitation embodied in some rule which he had never seen could not be imputed to him. That rule, therefore, constituted no part of the contract. "Railway passengers are not required to know the rules and regulations made by the directors of a company for the control of the actions of its agents and the management of its affairs." *Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859. In that case, this principle was applied in favor of a passenger who had relied upon the representations of an agent as to the extent to which a ticket purchased by him was good for passage. It seems that the ticket on its face was a little uncertain. It was not controverted that the purchaser had read the ticket. Being uncertain as to what its language meant, he applied to the agent for an explanation, and was informed that it was good for a passage to the point to which the purchaser desired to go, and to which he had paid the fare. The conductor

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refused to carry him to that point, and required him to pay an additional fare for a portion of the distance. To the same effect, see *Murdock v. Railroad Co.*, 137 Mass. 293, 50 Am. Rep. 307. *Maroney v. Railway Co.*, 106 Mass. 153, 8 Am. Rep. 305, is directly in point, holding as follows: "A regulation by a railway company, restricting the holder of a certain class of tickets to special trains, nothing of the kind appearing on the tickets, will not justify the expulsion of the holder of such a ticket from the regular trains; he having taken passage thereon without knowledge of the regulation." These decisions and views are fully sustained by the general principles stated in 28 Am. & Eng. Ency. Law, 174. The authorities agree that the purchaser of a ticket, or a contractor for carriage, in order to be bound by a limitation, must have knowledge of it; but there is disagreement among them as to what amounts to notice, and as to the extent of the duty of a person contracting for carriage to carefully examine all of the stipulations written or printed in the contract.

No ground is perceived upon which the court could have set aside the verdict, other than the erroneous impression that the verdict was excessive. *Trice v. Chesapeake & Ohio Ry. Co.*, 40 W.Va. 271, 21 S. E. 1022, propounds the following rule governing the quantum of damages in such case, which, as applied in that case, would sustain the verdict in this: "Where the case is one of indeterminate damages, and the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case; but, if so excessive as to induce such belief, it will be set aside." The railway conductor who ejected the passenger in that case did not act maliciously, nor had the plaintiff suffered any serious damage. He was ejected from the train because the mileage book, tendered in payment of his fare, bore on its face evidence of having been altered. It had been stamped as a book for a previous year, and the date was afterwards changed with a pen. The agent who sold it had put the wrong date on it, and then attempted to correct it. Unaware of this mistake, and suspecting fraud, the conductor refused to accept it, and put the passenger off, without any violence or ill treatment, at a regular station, where he suffered nothing from inclemency of the weather, and was delayed only a short time. A verdict of \$550 was sustained by this court, under the rule above stated.

A copy of an order of the court below, showing that a new trial has been had, since the writ of error was granted, in which the plaintiff obtained a judgment for \$50, is presented, with the brief, to sustain the contention that the matter in controversy has been settled and ended, by arrangement of the parties outside of this court. The plaintiff resisted the new verdict, by a motion to set it aside, which the court overruled. The copy of the order, therefore, fails to show any settlement of the matter in controversy. The judgment has not been appealed from; but, if it has

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been taken before the awarding of the writ of error, the plaintiff would not be bound to accept it, nor would it preclude him from insisting upon the error committed in the setting aside of the former verdict. In *Gwynn v. Schwartz*, 32 W. Va. 487, 9 S. E. 880, a verdict was set aside, and the new trial awarded had been had, resulting in a verdict, contrary to the one obtained on the first trial, and the case was then brought to this court on a writ of error to the final judgment, as well as to the order setting aside the first verdict; and this court, perceiving error in the action of the court below in setting aside the first verdict, reversed both judgments, and rendered a judgment on the first verdict. The same action occurred in *Davis v. Telephone Co.*, 53 W. Va. 616, 45 S. E. 926. For the position that the plaintiff was not bound to wait for a final judgment, in taking his writ of error, the statute referred to in the statement of the case is express and indisputable authority.

While the judgment is not before this court for review, and therefore cannot be vacated or reversed here, it discloses to us that the reversal of the order, setting aside the first verdict, will, when the mandate of this court goes down, establish in the court below error in said judgment, if not, indeed, want of jurisdiction in that court to try the case and render judgment, at the time at which it did so. Seeing this, in order to avoid the anomaly and injury of two judgments for the same cause of action, we should reverse the order complained of, thereby reinstating the verdict set aside by it, and remand the case to the circuit court for the rendition of judgment thereon. Then, under its power of restitution and correction of its own errors, it may be able to vacate the judgment, set aside the second verdict, and render judgment on the first. Though the record upon which a judgment or decree, brought into this court on a writ of error or appeal, cannot be amended or altered as to matter upon which it is based, and original jurisdiction cannot be conferred upon this court, as to matters not acted upon in the court below, by amendments made here, this court may be governed in its action by subsequent proceedings of the court below, brought to its attention. If, pending an appeal, the parties, by consent and agreement, cause such further proceedings to be had in the court below as to dispose of the whole subject of controversy, this court is thereby deprived of its jurisdiction, and will dismiss the appeal. *Baker v. Tappan*, 56 W. Va. 349, 49 S. E. 447. As we can ascertain, from subsequent orders of the lower court, conduct of the parties which deprives this court of its jurisdiction, it seems to follow that we can consider such an order so far as to sustain our refusal, to a party who has taken one judgment for the same cause of action.

The order complained of will therefore be reversed and set aside, and the case remanded for the rendition of judgment on the verdict found on the 24th day of January, 1906.

WILLIAMS v. LOUISVILLE & N. R. Co.

(Supreme Court of Alabama, April 11, 1907.)

[43 So. Rep. 576.]

Carriers—Care of Passengers under Disability.—*A carrier, knowingly accepting as a passenger a person physically unable to take care of herself, must render to her such special assistance as her condition requires, so that she may be safely transported.

Same—Actions—Complaint—Sufficiency.—A complaint in an action against a carrier which alleges that plaintiff was at a station to be carried as a passenger; that she was weak and hardly able to walk; that the train, on reaching the station, stopped to take on passengers; and that the carrier, through its servants, accepted her as a passenger and transported her to her destination, and received her fare, and through its servants proceeded to assist her to board the train, but performed the service negligently, causing injury to her—shows, as against a demurrer, that plaintiff at the time of the injuries had been accepted as a passenger, that the servants knew of her physical condition, and that they acted within the scope of their authority, and states a cause of action.

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

Action by Cora Williams against the Louisville & Nashville Railroad Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Brown & Leeper, for appellant.

Whitson & Harrison and *E. H. Dryer*, for appellee.

TYSON, C. J. Appellant's counsel do not seriously insist that the trial court was in error in sustaining the demurrer to the first, second, and third counts of the complaint; but they do insist that the sustaining of the demurrer to the fourth was erroneous. That count alleges that plaintiff was at one of the stations on defendant's road for the purpose of being carried as a passenger; that she was just recovering from a severe spell of sickness, on account of which she was very weak and hardly able to walk; that when the passenger train of defendant reached the station "it was stopped for the purpose of taking on and putting off passengers, and that defendant then and there, through its agents and servants, accepted plaintiff as a passenger and transported her as such on said train from said station to her destination, and received her fare and pay for the same, but that defendant through its agents or servants undertook and proceeded to assist plaintiff to board said

*For the authorities in this series on the subject of the duties and liabilities of the carrier as affected by the infirmity or helpless condition of the passenger, see foot-notes appended to *Illinois Cent. R. Co. v. Cruse* (Ky.), 21 R. R. R. 145, 44 Am. & Eng. R. Cas., N. S., 145.

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train, by lifting her up the steps of a passenger coach of said train, but performed said service carelessly and negligently; that she was caused to fall or be violently thrown from said steps to the ground, thereby causing her great injury," etc. While a carrier is under no duty to accept as a passenger a person who is physically unable to take care of herself unattended by a care taker, yet if such a person, without an attendant, is accepted by the carrier as a passenger, and his disability is apparent or made known at the time of his application for carriage to the servants of the carrier, it becomes the duty of the carrier, to render to such person such special care and assistance as his condition may require in order that he may be safely transported. 6 Cyc. p. 599; 5 Am. & Eng. Ency. Law (2d Ed.) —; 2 Hutchinson on Carriers (3d Ed.) § 992. But, "whether bound to assist a passenger or not, a carrier is always liable for negligence in so doing." 2 Sher. & Red. on Negligence (5th Ed.) p. 929, § 510.

But it is insisted that the count fails to show that plaintiff had been accepted as a passenger prior to receiving her injuries. We do not so read it, and do not think its language is fairly susceptible of any such construction. To the contrary, the averment shows clearly and unequivocally that she was accepted as a passenger before attempting to board the train. It is of no consequence that she had not purchased a ticket or paid her fare at that time. Whether the court sufficiently shows that the agents or servants had knowledge of plaintiff's physical condition is not raised by the demurrer. Their knowledge of it may certainly be fairly inferred from the facts averred; so, then, it cannot be said that the count fails to state a cause of action.

There is clearly no merit in the contention that the count is subject to that ground of the demurrer that no facts are averred which show that defendant's servants or agents were acting within the scope of their authority or in the line of their duty.

The action of the court in sustaining the demurrer to the count under consideration was erroneous.

Reversed and remanded.

DOWDELL, ANDERSON, and McCLELLAN, JJ., concur.

CINCINNATI, HAMILTON, & DAYTON RAILWAY COMPANY *et al.*,
Appts., *v.* INTERSTATE COMMERCE COMMISSION.

(Argued January 31, February 1, 1907. Decided May 13, 1907.)

[27 Sup. Ct. Rep. 648.]

Interstate Commerce Commission—Powers.—The Interstate Commerce Commission, in making an investigation of a complaint filed by soap manufacturers as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory, had the power, in the public interest, unembarrassed by any supposed admissions contained in the complaint, to consider the whole subject, and the operation of the classification in the entire territory, and also how far its going into effect would be just and reasonable, would create preferences, or would engender discrimination.

Interstate Commerce Commission—Judicial Enforcement of Order.—Any supposed admissions in a complaint filed by soap manufacturers with the Interstate Commerce Commission as to the freight rate for common soap promulgated in a classification adopted to govern in official classification territory are ineffectual to deprive a Federal circuit court, in a proceeding to enforce an order of the Commission directing the carriers to desist from enforcing this classification as to soap in less than car-load lots, of the power to test the validity of such order by the scope of the act to regulate commerce.

Carriers—Rates—Classification.—The disturbance in the relations between freight rates for soap in car-load and less than car-load lots created by advancing the former from class 6 to class 5, and the latter from class 4 to class 3 in a new classification adopted to govern in official classification territory, was not cured by classifying soap in less than car-load lots at 20 per cent. less than third class, but not less than fourth class, where the result of applying this modified percentage classification to the varying rates is to leave soap in less than car-load lots in the fourth class in portions of the territory and in a higher class in other portions.

Appeal—Review of Facts.—Findings of the Interstate Commerce Commission that a classification of freight rates adopted to govern in official classification territory produces preferences and discriminations will not be interfered with on appeal when concurred in by a Federal circuit court unless the record establishes that clear and unmistakable error has been committed.

Carriers — Rates — Classification — Preferences.—Unlawful preferences and discriminations are created by fixing the freight rate for common soap in less than car-load lots in a new classification adopted to govern in official classification territory at 20 per cent. less than third class, but not less than fourth class, at which that commodity had previously been rated, where the result of applying this classification to the varying rates is to leave soap in less than car-load lots

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in the fourth class to a considerable extent in one of the subdivisions of such classification territory, and in a higher class in the other subdivision.

Interstate Commerce Commission—Powers.—The Interstate Commerce Commission is acting within its powers under the act to regulate commerce in ordering carriers to desist from further enforcing a classification by percentage of common soap in less than car-load lots, operating throughout official classification territory, which it finds has brought about a general disturbance in relations previously existing in that territory, and has created discriminations and preferences among manufacturers and shippers of the commodity, and between localities in such territory.

Appeal from the Circuit Court of the United States for the Southern District of Ohio to review a decree enforcing an order of the Interstate Commerce Commission directing carriers to cease and desist from further charging the freight rate for common soap in less than car-load lots promulgated in a classification adopted to govern in official classification territory. Affirmed.

See same case below, 146 Fed. 559.

The facts are stated in the opinion.

Messrs. Edward Colston and Lawrence Maxwell, Jr., for appellants.

Messrs. L. A. Shaver and P. J. Farrell, for appellee.

MR. JUSTICE WHITE delivered the opinion of the court:

Official classification territory embraces that portion of the United States lying between Canada on the north, the Atlantic ocean on the east, the Potomac and Ohio rivers on the south, and the Mississippi river on the west. This territory includes what is known as Central Freight Association territory and Trunk Line territory, both being governed by official classification. The Central Freight Association territory comprises the area west of Pittsburg and Buffalo, including the lower peninsula of Michigan and east of a line from Chicago to St. Louis, the Mississippi river from St. Louis to Cairo, and north of the Ohio river. Trunk Line territory lies north of the Potomac river and east of Pittsburg and Buffalo. Whilst official classification governed throughout the whole of official classification territory, the rates throughout the whole of the official classification territory were not uniform, because of a difference of rates prevailing in the subdivision; that is, in the Central Freight and Trunk Line territory. Thus, although on shipments from points in the Central Freight Association territory to points in the Trunk Line territory or *vice versa* rates were the same for similar distances, yet, on shipments between termini wholly within one or the other of these territories, the rates varied because of the different rules governing rates which prevailed as to traffic exclusively moving in that particular territory.

The first classification adopted by the railroads to control in the

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territory above described as official classification territory was made contemporaneously with the going into effect of the act to regulate commerce, presumably to comply with that act, and took effect on April 1, 1887. From that date until January 1, 1900, nineteen general classifications of freight, numbered from 1 to 19, were, at various times, adopted to govern in official classification territory. The articles embraced in these classifications were divided into classes, numbered from 1 to 6, the rate increasing as the number of the class decreased. From the beginning, until June 1, 1891, common soap in boxes in car loads was rated as fifth class, and fourth class for less than car loads. On the last-named date, in consequence of an order entered by the Commission on a complaint as to the classification of common soap in car loads, made by Procter & Gamble, soap manufacturers, of Cincinnati, Ohio, soap in car loads was reduced to sixth class. This classification continued to govern until January 1, 1900, when a new classification, known as official classification No. 20, went into effect, by virtue of which soap in car loads was advanced from sixth to fifth class, and soap in less than car loads was advanced from fourth to third class.

After the going into effect of classification No. 20, the Procter & Gamble Company, successor to the firm of Procter & Gamble, complained to the Interstate Commerce Commission in respect to the alterations made in the classification of common soap. The petition recited the prior complaint by the firm of Procter & Gamble, and the making, in 1890, of the order which led to the reduction from fifth to sixth class, heretofore referred to.

It was charged in the petition that, in official classification No. 20, there had been an inequitable selection of particular articles and an increase in the rates upon such articles alone by the device of changing them from a lower to a higher class, for the sole purpose of increasing revenues to cover an alleged increase of cost of operation of the railroads; and that, "by such course defendants have subjected and do thereby subject the said traffic in the articles changed, including common soap in car loads and less than car-load lots, to an undue and unreasonable prejudice and disadvantage with respect to the traffic in all of the articles whose classification was not changed in official classification No 20." It was further alleged as follows:

If there are any qualities and conditions which, though not considered by defendants at the time of the adoption of said classification No. 20, justify, nevertheless, the making of any or part of said changes, the same, at any rate, do not apply to common soap in car loads or less than car-load lots. The same should, at least, have remained in sixth class in car-load lots, as ordered by this Commission as aforesaid, and in fourth class in less than car-load lots, so as to maintain the proper relation and difference of rates between car-load and less than car-load lots. The changing of particular articles as aforesaid from lower to higher classes for the sole purpose of increasing the revenues of the railroads interested therein is not a condition or circumstance justifying the said change of classification in common soap."

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It was prayed that an order might be entered requiring the Cincinnati, Hamilton, & Dayton Railroad Company and seven other named railroad companies, forming various connecting and joint lines of railroad in the territory governed by official classification No. 20, to "cease and desist from refusing to carry common soap in car-load lots at sixth-class rates, and from refusing to carry common soap in less than car-load lots at fourth-class rates." After the filing of the petition, and before answer, official classification No. 20 was, in part, changed by making a new class, intermediate classes three and four for soap in less than car-load lots and on some other articles, this class being determined by giving the articles in question the benefit of a reduction on the third-class rate of 20 per cent., provided the application of the 20 per cent. reduction did not reduce the charge below the fourth-class rate, in which event the 20 per cent. reduction should not be fully applied, but would only be applied to the extent necessary to make the rate, not less than fourth class. The classification thus operating is spoken of as 20 per cent. less than third class, but not less than fourth class, and we shall speak of it hereafter in this way.

In the answers filed the defendants in substance denied that common soap was improperly classified in official classification No. 20, originally or as modified, or that an unreasonable or unlawful rate was exacted for the carriage of soap, or that the defendants subjected the soap traffic to any undue or unreasonable prejudice, disadvantage, or discrimination.

The taking of testimony was ended on September 26, 1900, and the report and opinion of the Commission was filed about two and a half years thereafter; *viz.*, on April 10, 1903. 9 Inters. Com. Rep. 440. As respects putting car-load soap in the fifth class, the Commission refrained both from deciding that the classification was unreasonable *per se* or that its reasonableness had been affirmatively established. It said:

"We regard the primary and controlling question in this case as a question of classification; that is, of relative rates, and dispose of it accordingly. In that view it is sufficient to hold that car-load soap is not improperly placed in the fifth class, and that fifth-class rates therefore are not shown to be unlawful. So long as most articles entitled to as low rates as car-load soap are put in the fifth class and required to pay fifth-class rates, we are not warranted, on the evidence before us, in condemning the same rating for that commodity. This disposition of the case, however, will not authorize the retention of car-load soap in fifth class if the classification of other articles with which soap is compared should be reduced, nor will anything now decided preclude the Commission from holding, in an appropriate proceeding, that fifth-class rates in this territory are excessive."

In regard to the less than car-load classification of common soap, after directing attention to the fact that such traffic had always been fourth class until January 1, 1900, the Commission said:

"A presumption that such rates are reasonable arises from the

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voluntary action of the carriers in keeping those rates in effect during such a long period, and that presumption has not been overcome, in our judgment, by the evidence in this case."

It was also found that certain rules set out in the findings governing car loads of mixed freight, permitting the carriage of the same at car-load rates, coupled with the increase in the long-standing less than car-load rates on soap, operated a strong discrimination in favor of meat packers who manufactured soap, against manufacturers who were mainly engaged in manufacturing and selling soap. So, also, the Commission held that the change as to the classification of soap in less than car-load lots, besides involving the payment of higher rates for less than car-load shipments, had brought about rate relations different from those previously existing between shippers of soap in official classification territory. Thus it was found that, as a result of the new method of classification, a shipper located at New York city could ship therefrom to practically all points in New England and a large number of points in New York state without paying higher than fourth-class rates, while a shipper located at Cincinnati could not ship northerly or northwesterly therefrom, more than about 60 miles, without paying an advance over fourth-class rates. The Commission expressly declared that "the difference of 15 cents between fifth class and third class, which was in effect as between car-load and less than car-load shipments from January 1, to March 10, 1900," the time during which official classification No. 20 prevailed, before it was modified by the percentage reduction as to soap in less than car-load lots, "would plainly be excessive," and that the change operated by the percentage modification in question occasions a difference "which varies according to a given per cent., as applied to different scales of rates, appears to be inequitable and unjust, and the fact is so found."

In the order, as entered, the Commission dismissed so much of the complaint as referred to the classification of common or laundry soaps in car loads, and the defendants were "notified and required to cease and desist, on or before the 15th day of June, 1903, from charging, demanding, collecting, or receiving for the transportation of common or laundry soap in less than car-load quantities charges or rates per one hundred pounds, equal to 20 per cent. less than rates fixed by them for the transportation of articles, designated as third class in their established freight classification, called and known as the 'official classification,' which said 20 per cent. less than third-class rates for the transportation of common or laundry soap in less than car loads are found and determined in and by said report and opinion of the Commission to be in violation of the act to regulate commerce."

The railway companies not having complied with the order, this proceeding was commenced by the Commission in the circuit court of the United States for the southern district of Ohio, under the direction of the Attorney General of the United States, to enforce compliance therewith. As respects the alleged unlawful character of the change in the classification of soap in less than car-load quantities, it was charged in the petition as follows:

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"And the petitioner charges that the action of the defendants in raising the classification of common or laundry soap in less than car-load quantities, on December 29, 1899, from fourth class, to third class, and subsequently on March 10, 1900, changing the classification of common or laundry soap in less than car-load quantities to 20 per cent. below third-class rates, the same being more than fourth-class rates, was in violation of the act to regulate commerce; and petitioner further charges that the rates charged by the defendants since December 29, 1899, for the transportation of common or laundry soap in less than car-load quantities are in violation of § 1 of the act to regulate commerce, in that they are unreasonable and unjust; and said rates are and have been in violation of § 3 of said act, in that said rates, based upon the classification aforesaid, give an undue and unreasonable preference or advantage to other description of traffic, and subject common or laundry soap in less than car loads to an undue prejudice and disadvantage. The petitioner further charges that the change in classification by the defendants, made effective about December 29, 1899, whereby common or laundry soap in less than car-load quantities was changed from fourth to third class, and the change in classification by the defendants, made effective March 10, 1900, whereby common or laundry soap in less than car-load quantities was charged more than fourth-class rates, to wit, 20 per cent. below third-class rates, were in violation of said act to regulate commerce, in that said changes were unreasonable and unjust, and result in unlawful discrimination and prejudice against common or laundry soap in less than car-load quantities, and against localities in official classification territory, wherein commodities are produced and transported, and against producers, shippers, dealers, and consumers in said territory."

In the various answers filed issue was taken upon these averments without any intimation that any of the issues so tendered were improper to be raised.

The case was heard in the circuit court on the evidence before the Commission and on additional evidence taken by the defendants, principally directed to showing the extra cost incident to handling and transporting freight in general in less than car-load lots. The complainant took no additional testimony. The circuit court decided in favor of the Commission (146 Fed. 559), holding that the evidence not only failed to justify the change of classification complained of, but established that the advance in rates caused by the increase in the classification of soap in less than car-load quantities was not only unreasonable and unjust, but also resulted in an unlawful discrimination and preference between shippers. The case was then appealed to this court.

Before considering the fundamental question upon which the order of the Commission and the decree of the court enforcing it rest, we dispose of certain propositions relied upon by the railway companies, because to do so we think will clear the way for an analysis of the final question arising, stripped of confusing and irrelevant considerations. We think the Commission, in making

an investigation on the complaint filed by the Procter & Gamble Company, had the power, in the public interest, disembarrassed by any supposed admissions contained in the statement of complaint, to consider the whole subject and the operation of the new classification in the entire territory, as also how far its going into effect would be just and reasonable, would create preferences, or engender discriminations; in other words, its conformity to the requirements of the act to regulate commerce. And that such was the view taken as well by the railway companies as by the Commission during the course of the investigation before that body is, we think, beyond doubt. Thus, on the examination of the very first witness called for the complainant before the Commission, counsel for the railway companies stated that, in his opinion, the pending investigation had "no significance except as preliminary to a judicial proceeding." And when, at the threshold, a question was raised in the examination of the same witness as to the competency of evidence on a subject not directly expressed in the complaint, but bearing upon the effect of the new classification, the Commission declared it was competent to show the general effect of such classification in the territory through which it operated. Our assent to this view of the power of the Commission conclusively, of course, also disposes of the contention that the court was without authority to determine the validity of the order of the Commission by the scope of the act to regulate commerce, because of an admission asserted to exist in the complaint originally filed before the Commission. It is needless, moreover, to say that the course of the proceeding before the Commission which we have stated strips the case of any element of surprise or possible prejudice.

The Commission, as we have seen, did not find that the rate promulgated in official classification No. 20, as to soap in car loads, was unreasonable, preferential, or discriminatory. From this it is elaborately argued that the order rendered by the Commission demonstrates its own error. This proceeds upon the following theory: For a number of years prior to 1891 soap in less than car loads was in the fourth class, and soap in car loads in the fifth class. By the order of the Commission, rendered in 1891, as we have seen, soap in car loads was put in the sixth class. By official classification No. 20 soap in car loads was moved up to fifth, and soap in less than car loads from fourth to third class. The change made by the new classification destroyed the previous relation, since the difference between the rates governing third and fifth classes made by the new was greater than the difference between the fourth and sixth classes as obtaining in the prior classification. And this was one of the complaints made by the Procter & Gamble Company concerning the new classification No. 20. The carriers, it is said, to meet this objection, adopted, after the complaint was filed, the modified classification of 20 per cent. less than third class, but not less than fourth class. The effect of this reduction, it is declared, was to cause soap in less than car loads to occupy just the same relative position to soap in car loads

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as it had occupied in the classification existing prior to the going into effect of official classification No. 20. And as the order of the Commission did not change the classification as applied to soap in car loads, made by official classification No. 20, the proposition is that that body, in holding the modified classification of 20 per cent. less than third class, and not less than fourth class, to be illegal, destroyed the relation which the Commission had created by its former order, and which it was the purpose of the complaint of the Procter & Gamble Company to restore. But the argument takes for granted the very question for decision,—that is, whether the modified classification of 20 per cent. less than third class, but not less than fourth class, operated to continue the relation between soap in car loads and soap in less than car loads, which prevailed throughout official classification territory before the making of official classification No. 20. That the proposition thus begs the whole question is demonstrated by the mere statement that both the Commission and the court below decided that official classification No. 20, as modified as to soap in less than car loads by the percentage order, was unreasonable, discriminatory, and, by its effect, created preferences among manufacturers and shippers of soap which had not existed prior to the new classification. When the real significance of the proposition is thus seen it amounts to this, that we must assume that both the court below and the Commission erroneously decided the controversy, and, upon this mere assumption, proceed to reverse their action. But our duty not to assume, but to decide the case, cannot be thus obscured.

Laying aside, however, the questions of unreasonableness of discrimination, and of preference and the consequent destruction, if these effects exist, by the new classification, of the prior relation between soap in car loads and less than car-load quantities, let us briefly consider the intrinsic merit of the proposition relied upon. It is that prior to official classification No. 20 there was a just relation between soap in car loads in class 6 and soap in less than car loads in class 4. Of course, this admits that such just relation was destroyed by official classification No. 20 as originally put in force, since thereby soap in car-load lots was placed in class 5 and soap in less than car loads in class 3, between which classes there was a greater difference relatively in rates than theretofore existed between the two commodities in the prior classification. This inequality the carriers declare was obviated after the complaint was filed by the modified classification as to soap in less than car-load lots of 20 per cent. less than third class, but not less than fourth class. By this means, it is insisted, the relation previously existing was recreated, and any disturbance engendered by official classification No. 20 was cured. Now, on the surface of things, the contradiction of the position is manifest. The modified rate on its face did not propose to put soap in less than car loads throughout the whole territory in a uniform class, but in the class which might result from the operation of a percentage basis, controlled by whether or not the application of the percentage might or might not take soap out of one class and into another. In other words, it

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clearly contemplated that, by the varying rates to which the percentage would be applied, soap in less than car loads would be left in portions of the territory in fourth class and in a higher class in other portions. How, in view of this, it can be in reason conceived that the admitted uniform classification prevailing prior to the percentage rule could possibly continue under a classification inherently wanting in uniformity, we fail to understand.

But put the foregoing considerations aside. The complaint as to the order of the Commission is that it disturbed the previous relations between soap in car loads and less than car loads. What was the order? In effect it condemned, and directed the carrier to desist from enforcing, the modified percentage classification. At the worst view for the carrier the order complained of can only be taken as persuasively indicating—and such was the view intimated in the opinion of the Commission—the duty of the carriers to return soap in less than car loads to class 4, in which it had been uniformly placed prior to the going into effect of official classification No. 20. The real grievance which the railway companies must have reduces itself to this,—that the order may lead to the putting of soap in less than car loads in class 4. But the very percentage basis which the carriers adopted contemplated that, in some portions of the territory and somewhere, the effect of the modification by a percentage reduction might be to put soap in less than car loads in the fourth class; else; why the limitation, “but not less than fourth class,” contained in the modified classification.

We are thus brought to the fundamental question, which is, Did the percentage classification lead to rates which were unreasonable, unjustly discriminatory, or unduly preferential? If either was the result, the order directing the carriers to desist from enforcing the classification in question was proper.

We take up the related questions of discrimination and preference because the arising of such consequences from the classification more saliently appear, and because the demonstration of such results is, in a measure, elucidated by what we have previously said. Concerning the discrimination the Commission said:

Whatever the effect of a percentage less than third class for less than car-load shipments of other commodities, taking that rating under the classification, may be, it plainly works discrimination against complainant and other western shippers of soap in less than car-load lots, in favor of their competitors in the East, when the present situation is compared with that which existed under the old fourth-class rating.”

And this finding was expressly concurred in by the circuit court. In pointing out the mode by which the modified classification operated the result in question, the Commission said:

“These differences are due to variations in the scales of rates prevailing in the different sections. The 20 per cent. less than third-class rating for less than car-loads applies to all shippers of less than car-load lots of soap throughout the entire territory, but it increases some rates more than others, and leaves some as

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they were before it was adopted. When, for example, under the application of that rule, the rate from Cincinnati to Boston is increased 4 cents, and the rate from New York to Boston remains the same, as compared with the fourth-class rates formerly in effect, it is plain that this method of determining rates upon a percentage basis operates unequally upon the different shippers of less than car-load quantities in that territory."

The statute gives prima facie effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed. See *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 194, 40 L. ed. 935, 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 672, 44 L. ed. 309, 318, 20 Sup. Ct. Rep. 209.

It is insisted that this is a case of that character. How, in reason, it is urged, can it be said that discrimination or preference, which did not before exist, was or could be produced from the mere application to the prior rates of a uniform percentage deduction? This, however, obscures the fact that the 20 per cent. reduction was not uniform, but was that percentage less than third class, with the qualification "but not less than fourth class." In other words, the modified percentage reduction was not a fixed percentage, but was one which might vary, depending upon the result which would be brought about by applying the rule. Putting, however, entirely aside this view, let us consider only the result of the working of the rule on the basis of 20 per cent. less than third class. The factors to be considered are these: a, the relation existing prior to the going into effect of official classification No. 20; b, the operation of that classification over the whole of official classification territory; c, the percentage modification of 20 per cent. less than third class as to soap in less than car loads, and also its operation over the whole territory; and, d, the varying rates of charges in the separate spheres into which the official classification territory was divided, viz., Central Freight Association territory and the Trunk Line territory. Now, testing the matter by these criteria, does it appear, as contended, that the findings of the Commission and the court, as to resulting preferences and discrimination, are so contradictory and erroneous that we should disregard them? The proposition that they were must rest upon the assumption that the application of a fixed percentage reduction to existing rates, whilst it might vary them, could not possibly change their relation. But this assumes that the variation which existed between rates in the different spheres of official classification territory was only a difference in the sum of the rate prevailing in one territory from that which prevailed in the other as to the same class. But this is a mistake, since there was also a difference in the two separate spheres of territory as to the margin of difference between the different classes of rates governing in the two territories. Thus, there was in Central Freight

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Association territory not only a higher rate for commodities in the third class than prevailed in Trunk Line territory for the same class, but there was also in the Central Freight Association territory a wider difference between the rates governing commodities in the third class and those controlling commodities in the fourth class. It follows from this that where, in any given case, the 20 per cent. reduction was applied to the increased rate which had arisen from having placed less than car-load soap in the third class, if the application of the full 20 per cent. reduction was not sufficient to reduce the amount to the fourth class, the commodity would pay more than fourth class. In other words, although the commodity in the case stated would get the full benefit of the 20 per cent. reduction from the third-class rate, as giving it that benefit did not reduce to the fourth-class rate the commodity would yet pay higher than fourth-class rate. It also follows that if, in any case where the 20 per cent. reduction was applied the result of applying it, because of the narrowness of the difference between third and fourth class in that territory, operated to reduce the same to the fourth class, the commodity would be left exactly in the class in which it stood before,—that is, fourth-class. By this it indubitably resulted that in a large degree in one of the subdivisions of the same classification territory soap in less than car loads remained in fourth class, and in the other took a higher class. And this illustrates the correctness of the findings of the Commission and of the court as to the preference resulting from applying to a territory governed by one classification a rule of percentage which, while assuming unity, produced diversity, and which, while asserting equality of class, engendered inequality. Of course, we confine our decision to the case before us.

And the views heretofore expressed serve also to dispose of the contention that, although it be conceded that discrimination and preference was created, yet the carrier should not have been ordered to desist from enforcing the modified percentage classification, because the discrimination and preference, if any, were not the result of the operation of that classification, and, moreover, were not repugnant to the act to regulate commerce, because they were simply the consequence of natural competitive advantages enjoyed by shippers in the sphere of the Trunk Line territory, which were not possessed by shippers in that other portion of official classification territory, known as Central Freight Association territory. But this simply involves a restatement of the misconception which we have already pointed out. The discriminations and preferences which the Commission and the court below found to exist were results arising from the application to the conditions prevailing in official classification territory of the modified percentage classification. In other words, the order forbidding the enforcement of the modified percentage classification was based on the finding that that classification disturbed the rate relations theretofore existing in official classification territory, and created preferences and discriminations which would disappear if the further enforcement of the changed classification was prevented.

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This brings us to the final contention made on behalf of the railway companies, viz., that the order of the Commission was not lawful, because not within the power conferred by the act of Congress. This is, we think, largely disposed of by what we have previously said as to the nature and scope of the investigation which the Commission was authorized to make and the redress which it was empowered to give irrespective of the particular character of the complaint by which its power may have been previously invoked. Whatever might be the rule by which to determine whether an order of the Commission was too general where the case with which the order dealt involved simply a discrimination as against an individual, or a discrimination or preference in favor of or against an individual or a specific commodity or commodities or localities, or as applied to territory subject to different classifications, we think it is clear that the order made in this case was within the competency of the Commission, in view of the nature and character of the wrong found to have been committed and the redress which that wrong necessitated. Finding, as the Commission did, that the classification by percentage of common soap in less than car-load lots operating throughout official classification territory, brought about a general disturbance of the relations previously existing in that territory, and created discriminations and preferences among manufacturers and shippers of the commodity and between localities in such territory, we think the Commission was clearly within the authority conferred by the act to regulate commerce in directing the carriers to cease and desist from further enforcing the classification operating such results.

Affirmed.

BRENNISON *et al.* v. PENNSYLVANIA R. Co.

(Supreme Court of Minnesota, May 17, 1907.)

[111 N. W. Rep. 945.]

Carriers—Injury to Freight—Burden of Proof.*—*Frozens v. U. S. Ex. Co.*, 109 N. W. 834, and *Brennison v. Pa. Ry. Co.*, 110 N. W. 362, followed, and held, when perishable goods are delivered to a common carrier for transportation in a sound and merchantable condition, and delivered to the consignee in a damaged state, the burden is upon the carrier to prove that the damage was not occasioned by its negligence.

Same.—The evidence supports the finding of the trial court that the fruit was damaged by reason of the negligence of appellant company.

(Syllabus by the Court.)

*See foot-notes appended to *Lehman, Stern & Co. v. Morgan's etc., Co.* (La), 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

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Appeal from Municipal Court of Minneapolis; C. L. Smith, Judge.

Action by Fred Brennison and others against the Pennsylvania Railroad Company. Verdict for plaintiffs. From an order denying a new trial, defendant appeals. Affirmed.

Savage & Purdy, for appellant.

George C. Stiles, for respondents.

LEWIS, J. This action is almost identical with *Brennison v. Pa. Ry. Co.*, 110 N. W. 362. The trial court found that a car load of strawberries was delivered by respondents to a railway company at Mt. Olive, N. C., May 8, 1905, for shipment over the intervening common carriers, to be delivered to respondents at Buffalo, N. Y.; that appellant company was the last carrier, and received the car at Sunbury, Pa., with the goods in good, sound merchantable order and shipping condition; and, having been directed by respondents to divert the shipment from Buffalo to Allen & Otis Company, at Rochester, N. Y., the car arrived there May 13, 1905. Respondents claim that in transporting the berries from Sunbury to Rochester appellant negligently and carelessly conducted itself as a common carrier, and by reason thereof the fruit became overheated and moldy, and was damaged and depreciated in value to the extent of \$351. At the argument appellant presented for the first time the objection that respondents had no interest in the action and could not maintain it, for the reason that they had sold and consigned the berries to a commission firm in Rochester. We shall not undertake to discuss the merits of this proposition, as it was not presented to the court below.

It was undisputed that, when the refrigerator car arrived at Rochester, considerable of the ice in it had melted; but it was not definitely shown to what extent. The night watchman stated that by putting in his hand through a screen near the top he could feel the ice; but this left the matter uncertain as to the amount. Mr. Allen, the consignee, testified that the temperature in the car was warm, and that the berries were found in a very poor condition—sunken in the crates and the juice running. It was shown that perishable fruit can be shipped greater distances than this when properly cared for in refrigerator cars, and we consider the evidence sufficient to support the finding that appellant was negligent in caring for the fruit after it came under its control. Appellant contests the same question presented, fully considered, and decided in *Brennison v. Pa. Ry. Co.*, *supra*, viz., that the shipper made out a *prima facie* case by showing that the berries were in good condition when delivered to the initial carrier, and in a damaged state when received by the consignee, and that the burden was then upon the carrier to show that the damage did not result from any cause for which it was legally responsible. Appellant insists that the rule has never before been applied to perishable fruit, and that it is wrong in principle. We consider the question settled in this state, for the reasons set forth in the case referred to and in *Fockens v. U. S. Ex. Co.*, 109 N. W. 834.

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Common carriers, holding themselves out as shippers of perishable fruit, are held to a higher degree of care than when engaged in the shipment of household goods, or other articles not inherently perishable, and there is no reason why the rule as to burden of proof should not apply, since the carrier has the superior ability to furnish the proof as to what occasioned the damage.

Affirmed.

ST. LOUIS & S. F. R. CO. v. PEARCE *et al.*

(Supreme Court of Arkansas, April 15, 1907.)

[101 S. W. Rep. 763.]

Carriers—Shipment of Stock—Special Contract—Time to Sue and Limitations.*—A contract of carriage with a railroad company stipulating that no action against the company shall be maintained unless the same be commenced within six months next after the cause of action accrues is reasonable and valid.

Same—Evidence.—Plaintiffs' contract of carriage with defendant railroad for the transportation of stock stipulated that no action against defendant should be maintained unless commenced within six months after the cause of action accrued. Defendant's agent wrote plaintiffs within the period of limitation, requesting them to wait a few days until plaintiffs' claim for damages to shipment of stock could be investigated, but thereafter, and before the expiration of such period of limitation, notified plaintiffs that liability was denied. The evidence showed that plaintiffs' action to recover for damages was not commenced until nearly six months after the notice was given by defendant. Held, that plaintiffs could not recover.

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by Pearce and Puckett against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

L. F. Parker and *B. R. Davidson*, for appellant.

J. A. Rice, for appellees.

McCulloch, J. The plaintiffs, Pearce & Puckett, sued the railroad company to recover damages to a shipment of live stock caused by alleged negligence in failure to promptly transport and deliver at the destination. They exhibited with their complaint a contract of carriage with the company, containing, among other

*See *Northern Pac. Ry. Co. v. Kempton* (C. C. A.), 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542 (federal court would not enforce stipulation in shipping contract providing a 60-day limitation for an action thereon, which was void under express provisions of Mon. Civ. Code, 2245, though it was not prohibited by laws of Minnesota, where contract was made); note appended to *Texas & P. Ry. Co. v. Reeves* (Tex.), 8 Am. & Eng. R. Cas., N. S., 429; *Richardson v. Chicago & A. R. Co.* (Mo.), 13 Am. & Eng. R. Cas., N. S., 170.

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things, a stipulation to the effect that no action against the company should be maintained unless the same should be commenced within six months next after the cause of action should accrue. This action was commenced more than six months after the cause of action accrued, and the defendant pleaded the delay in bar of plaintiff's right to maintain the action. To avoid the effect of the delay, the plaintiffs introduced in evidence a letter addressed to them by defendant's authorized agent within the period of limitation requesting them to wait a few days until the claim could be investigated. It is, however, undisputed that on March 17, 1903, which was 1 month and 20 days before the expiration of the period of limitation, defendant's agent notified plaintiffs that the claim was disallowed and liability denied. They admitted that the notice was received.

The defendant requested the court to give the following, among other instructions, which request was refused: "(7) If you find from the evidence that the claim of plaintiffs was declined or turned down by the letter of J. E. Leith, freight claim agent, of date of March 17, 1903, that the letter was mailed post paid to Pearce & Puckett on or about the 17th of March, 1903, and was received by Puckett, a member of the firm, and if you find that either of them were notified prior to that time that the claim had been refused or declined, and you find that the complaint was not filed in this court until the 10th day of September, 1903, this cause of action would be barred by the stipulations of the parties and you should find for the defendant." This instruction should have been given. The stipulation is reasonable, and the court should have so instructed. 1 Hutchinson on Carriers, § 448. The undisputed evidence was that the notice had been given about 1 month and 20 days before the expiration of the period of limitation stipulated in the contract, and it contained an explicit denial of liability for the damage and a refusal to pay. The action was not commenced until nearly six months after the notice was given. This left nothing to be submitted to the jury, as the undisputed evidence established the bar to the plaintiff's right to recover.

Reversed and remanded.

CENTRAL OF GEORGIA RY. CO. *v.* JONES.

(Supreme Court of Alabama, April 11, 1907.)

[43 So. Rep. 575.]

Carriers—Loss of Baggage—Time for Delivery.*—Failure of a passenger to call for his baggage within a reasonable time after arrival, though terminating the carrier's absolute liability therefor as an insurer, does not absolve it from liability as a warehouseman or bailee for the loss of the baggage through the negligence of its station agent.

Same—Presumption of Negligence—Burden of Proof.†—In an action against a carrier for loss of a passenger's baggage, proof of the loss of the baggage after arrival raised a presumption that the carrier's agent was negligent.

Appeal from Geneva County Court; P. N. Hickman, Judge.

Action by A. E. Jones against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Espy & Farmer, for appellant.

E. Foster Ellsberry, for appellee.

TYSON, C. J. This action was brought by plaintiff to recover the value of a trunk and its contents, alleged to have been lost by reason of the negligence of defendant's station agent. It is made to appear, both by the pleading and the proof, that the trunk was delivered by plaintiff to defendant to be transported as baggage from a point in the state of Georgia to Malvern, a station on its line of road in this state. It was also shown that the trunk arrived at Malvern and was taken in charge by the defendant's station agent at that point, and that while in his possession it was taken by some one other than plaintiff during the day of its arrival or during the night of that day.

The point is made that it was the duty of plaintiff to call for his trunk within a reasonable time, and that his failure to do so until the next morning after its arrival and its taking absolves the defendant from all liability. It may be that it was plaintiff's duty

*For the authorities in this series on the question, when does the carrier's liability as a common carrier terminate after the arrival of the freight at its destination, see foot-notes appended to *Bowdon v. Atlanta Coast Line Ry. Co. (Ala.)*, 20 R. R. R. 735, 43 Am. & Eng. R. Cas., N. S., 735.

For the authorities in this series on the subject of the duties and liabilities of carriers as warehousemen, see foot-notes appended to *Charlotte Trouser Co. v. Seaboard Air Line Ry. (N. Car.)*, 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459.

†See *Lehman, Stern & Co. v. Morgan's, etc., Co. (La.)*, 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

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to call for his trunk within a reasonable time after its arrival, but his failure to do so did not absolve the defendant from all liability. His failure may have terminated the defendant's liability as carrier, which was that of an insurer, but that of warehouseman or bailee was still extant; and if the trunk was lost by reason of the negligence of its station agent, who received it, as alleged in the complaint, the defendant was liable, and proof of its loss raised the presumption of such negligence, and cast the burden of proof upon defendant of acquitting itself of negligence. 3 Am. & Eng. Ency. Law (2d Ed.) pp. 750, 751, and note.

The defendant having wholly failed to discharge this burden, the affirmative charge requested by plaintiff was properly given. Affirmed.

DODELL SIMPSON and ANDERSON, JJ., concur.

SNELLEN et al. v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Arkansas, April 15, 1907.)

[102 S. W. Rep. 193.]

Statutes—Construction—Construction of Statutes Adopted from Other States.—Where Congress put in force in a territory the statute law of a state, the construction which the courts of that state had placed upon it was also adopted.

Master and Servant—Injuries to Servant—Fellow Servants.*—An employee whose duties were to inspect cars in the yards, and, when found slightly out of repair, to repair them on a track set aside for that purpose, is a fellow servant of a brakeman and his crew employed to switch cars from one track to another in the yards, and no recovery can be had for injuries to one from the negligence of the others.

Master and Servant—Injuries to Servant—Contributory Negligence.†—Where a car inspector was required by the company's rules to inspect cars upon a certain track, unless allowed to inspect them elsewhere by the foreman or chief inspectors, and to display a blue

*For the authorities in this series on the question whether employees, charged with the duty of inspecting appliances, etc., are the fellow servants of the other employees of the railroad company, see foot-notes appended to *Illinois Cent. R. Co. v. Quirey* (Ky.), 20 R. R. R. 162, 43 Am. & Eng. R. Cas., N. S., 162; foot-notes appended to *Shuster v. Philadelphia, etc., R. Co.* (Del.), 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6.

†For the authorities in this series on the subject of the contributory negligence of and assumption of risks by employees where they fail to comply with their master's rules and regulations, see foot-notes appended to *Machren v. Great Northern Ry. Co.* (Minn.), 22 R. R. R. 564, 45 Am. & Eng. R. Cas., N. S., 564; *St. Louis, etc., Ry. Co. v. Carraway* (Ark.), 22 R. R. R. 532, 45 Am. & Eng. R. Cas., N. S., 532; *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130.

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flag upon the car, he was guilty of contributory negligence in attempting to repair the car without permission of the foreman or chief inspector, while on another track, and attempting to do so without displaying the flag.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by Annie Snellen and others against the Kansas City Southern Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Sam R. Chew, for appellants.

Read & McDonough, for appellee.

MCCULLOCH, J. This is an action against appellee railroad company to recover damages for the death of John B. Snellen, one of its employees, alleged to have been caused by the negligence of its servants. Snellen was employed as assistant car inspector and repairer at Stillwell, Ind. T., where he was at work when he was killed. He was an inspector primarily, and incidentally a car repairer; his main duties being to inspect cars in the yards, and, when found slightly out of repair, to repair them on a track set apart in the yards for that purpose. He was at work under the end of a car situated on what is called the "dining car" track, and another car, a caboose, stood on the same track in about eight feet of the car on which he was at work. He was in a stooping position under the end of the car next to the caboose when an engine with car attached which was switching in the yards came in on the track and struck the caboose, pushed it back against the other car, and crushed him to death. The rules of the company required those engaged in repairing cars on the tracks to display a blue flag as a warning on the car being repaired, and it was the duty of Snellen to do this, but he failed to do so. There was another track used exclusively as a repair track, and it was against the rules for a repairer to work on a car on any track except the repair track without instructions from the foreman or chief inspector. No instructions were given to Snellen to work on the car while on the dining car track, and he did so of his own accord.

Negligence, if any other than on the part of Snellen himself, existed only on the part of Tuttle, a brakeman, who opened the switch which let the engine in on the track where Snellen was at work. The signal to open the switch was given by Smith, another brakeman. It is not claimed that Smith knew or had any means of knowing that Snellen was at work under the car, but there was some evidence tending to show that Tuttle saw him at work under the car a few minutes before he threw the switch. Was the company liable for the negligence of Tuttle, the brakeman? The court gave a peremptory instruction to the jury to return a verdict in favor of the defendant, so we have only to determine whether or not there was evidence sufficient to go to the jury of negligence on the part of servants of the company for whose acts it was responsible.

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The accident occurred in the Indian Territory where the Congress of the United States had by an act approved May 2, 1890 (26 Stat. p. 94, c. 182, § 31), put in force chapter 20 of Mansfield's Digest of the Statutes of Arkansas which provided that the common law of England, so far as applicable and of a general nature, should be the rule of decisions in this state, unless altered or repealed by the General Assembly. *St. L., I. M. & So. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865. According to well-established canons of construction, where the statute law of one state is adopted in another state or territory, it adopts the construction which the courts of that state placed upon it. The decisions of this court rendered prior to May 2, 1890, which was prior to the passage of the railroad fellow-servants law in this state, established the rule that makes Snellen, the car inspector or repairer, and Tuttle, the brakeman, fellow servants. *Railway Co. v. Rice*, 51 Ark. 467, 11 S. W. 699; *St. L., I. M. & So. Ry. Co. v. Gaines*, 46 Ark. 555; *Railway Co. v. Shackelford*, 42 Ark. 417. And the decisions of this court since then reaffirm that rule. *Railway Co. v. Triplett*, 54 Ark. 299, 15 S. W. 831, 16 S. W. 266; *St. L. & S. W. Ry. Co. v. Henson*, 61 Ark. 302, 32 S. W. 1079; *Railway Co. v. Brown*, 67 Ark. 295, 54 S. W. 865; *Kenefick-Hammond Co. v. Rohr*, 77 Ark. 290, 91 S. W. 179. The definition of fellow servants is stated in those decisions to be "persons employed by the same master to accomplish one common object, and so related in their labors performed in the service of the master as ordinarily to be exposed to injuries caused by each other's negligence." The following decisions of the Supreme Court of the United States also sustain the view that Snellen and the brakeman were fellow servants: *N. P. Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railroad v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, and cases there cited. The evidence in this case shows that the duties of Snellen were to inspect and repair cars on the tracks at Stillwell, and that it was a part of the duties of Tuttle and the other men of his crew to switch cars from one track to another in the yard. This made them all fellow servants within the definition and the rule announced by the court in cases cited above. The company was therefore not responsible to one for injuries sustained by reason of the negligence of the others. There was no testimony introduced tending to show that the company was negligent in any particular. It formulated and put in force appropriate and efficient rules which, if observed by the various employees, were sufficient to protect them from danger while at work. Nor was there any evidence, as in the *Triplett Case*, *supra*, of negligence of the company or those of its servants in authority, in failing to enforce the rules. No one in authority was shown to have known of the perilous position of Snellen. Nothing appears whereby the company can be said to have been at fault. The trial court was therefore correct in giving the peremptory instruction.

The undisputed testimony establishing contributory negligence

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on the part of Snellen also justified the court in giving the peremptory instruction. He was guilty of negligence in attempting to repair the car without permission of the foreman or chief inspector, while on the dining car track, and also in attempting to do so without displaying the blue flag of warning. Conceding that Tuttle had notice of his position of danger, still, if he had displayed the danger signal, it could have been observed by the engineer and by Smith, the other brakeman, who gave the signal to let the engine in on the track where Snellen was at work.

Affirmed.

YAZOO & M. V. R. CO. v. KEYSTONE LUMBER CO.

(Supreme Court of Mississippi, April 15, 1907.)

[43 So. Rep. 605.]

Carriers—Regulation—Railroad Commission—Powers—Demurrage—Charges.—Ann. Code Miss. 1892, § 4291, provided that the railroad commission might fix all charges and supervise and regulate all persons, etc., who may own or operate express, telegraph, telephone, or sleeping car companies. Acts 1898, p. 97, c. 82, provided that all laws, acts, and parts of acts giving authority to the railroad commission to supervise common carriers shall also apply to car service associations or other associations governing or controlling cars or rolling stock and railroads at whatever place they do business in the state, and the same penalty fixed by law for disobeying the mandates or orders of the railroad commission shall apply to the car service associations, as well as associations of other characters. The provisions of the act of 1898 were incorporated in Code 1906, § 4843, as to the supervision of car service associations. Held, that the railroad commission had power to make rules as to reciprocal demurrage, and to make rule 10, adopted June 8, 1904, and effective June 18, 1904, providing that, when cars are properly loaded and shipping instructions given, the railroad agent must immediately issue bills of lading therefor, and that if a car or cars are detained or held, and not carried within 24 hours thereafter, the railroad shall be liable to the shipper for the payment of \$1 for each day or a fraction of a day that the car or cars are thus detained or held.

Appeal from Circuit Court, Yazoo County; D. M. Miller, Judge.
"To be officially reported."

Action by the Keystone Lumber Company against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals, with cross-appeal by plaintiff. Affirmed.

The Keystone Lumber Company, plaintiff below, instituted its action against the Yazoo & Mississippi Valley Railroad Company to recover damages for delayage claims on account of the alleged unreasonable delay in the transportation of certain freight delivered to the defendant for shipment. At the trial the defendant filed a special plea denying liability for such delayage, for the rea-

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son that the order of the railroad commission of the state of Mississippi attempting to create delayage charges is unconstitutional and void: (1) For the reason that neither under the Code nor the statute law is said railroad commission given the power to legislate and fix on railroad companies either penalties or fixed charges; (2) that the order of the railroad commission is arbitrary and oppressive, fixing a penalty on a railroad company and ignoring entirely the element of actual damage to the shipper; (3) that the order of the railroad commission is unconstitutional and void under the Constitution of the state of Mississippi and of the United States, because it practically attempts to authorize the taking of property of the railroad company without due process of law. The cause having originated in the justice's court, where no pleadings were required to be filed, no action was had on this special plea, and the trial was proceeded with. When plaintiff introduced evidence to establish its delayage claims, objection was interposed by defendant to all testimony tending to support such claims or to fix liability on the railroad company therefor, which objections were overruled by the trial judge, who held that delayage charges became due for delay in transportation of car-load lots, and that plaintiff was entitled to recover therefor, but that all claims for less than car-load lots should be disallowed, and so instructed the jury. From a judgment in accordance with the instruction, defendant appeals, and plaintiff files a cross-appeal.

The following are the demurrage and delayage rules adopted June 8, 1904, and effective June 18, 1904:

"Rule 1. Railroad companies shall, within twenty-four hours after the arrival of shipments, give notice by mail or otherwise to consignee of arrival of goods, together with weight and amount of freight charges due thereon, and on goods in car-load quantities said notices must contain letters or initials of the car, number of the car, and, if transferred in transit, the number and initial of the original car, net weight, and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

"Any railroad company failing to give such notice, and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 a. m. the day following the arrival, shall forfeit and pay to the consignee, or other party whose interest is affected, the sum of \$1.00 per car per day or fraction of a day on all car-load shipments, and one cent per hundred (100) pounds per day or fraction thereof on less than car-load lots, with a minimum charge of five cents for any one package, after the expiration of said 24 hours.

"Rule 2. Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock a. m. on the day after such notice has been given. Constructive

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notice referred to consists of posting notice by mail to the consignee: provided, however, that if, in any case, where notice of arrival is given by mail, the consignee will make oath that neither he, his agents, nor employees have received such notice, then no demurrage charges shall be made until after legal notice as above specified, is given.

"Rule 3. For all package freight not unloaded in depot or warehouse by railroad company within forty-eight hours, not including Sundays or legal holidays, computing from 7 o'clock a. m. on day following arrival, the railroad company may be subjected by the consignee to a charge for each day or fraction of a day that said freight remains in a car as follows: In less than car-load quantities, no more than one cent per 100 per day; in car-load quantities, not more than ten cents per ton of 2,000 pounds per day.

"All package freight unloaded in depot and warehouse, which is not removed by the owners thereof from the custody of the railroad company within forty-eight hours (not including Sundays or legal holidays), computed from 7 o'clock a. m. on the day following the day of legal notice of arrival, may be subject thereafter to a charge of storage for each day or fraction of a day that it may remain in the custody of the railroad company, as follows:

"In less than car-load quantities, not more than one cent per hundred pounds per day.

"In car load quantities, not more than ten (10) cents per ton of two thousand (2,000) pounds per day.

"When consignee resides more than three miles and within ten miles of the railroad station, five days' free time will be allowed.

"When consignee resides more than ten miles from the railroad station, seven days' free time will be allowed.

"Rule 4. Loaded cars, which by consent and agreement between the railroad and consignee, that are to be unloaded by consignee, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone, and wood, and all cars taking track delivery, which are not unloaded from the cars containing same within forty-eight (48) hours (not including Sundays or legal holidays), computed from 7 o'clock a. m. of the day following the day legal notice of arrival is given, and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day, or fraction of a day, that said car or cars remain loaded in the possession of the railroad company, it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage; that, when the period of such demurrage charges commence, they are to be placed accessible to the consignee for unloading purposes, on demand of the consignee: provided, however, that if the railroad company shall remove such car or cars after being so placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby: provided, further, that when any consignee shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood,

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coal, coke, lime, ore, sand, or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two hours.

"When consignee resides more than three miles and within ten miles of the railroad station, five days' free time will be allowed.

"When consignee resides more than ten miles from the railroad station seven days' free time will be allowed.

"Rule 5. When consignors ship goods to order, but express in their bills of lading the name of a person at destination to notify, it shall be the duty of the railroad company to give legal notice to such party in the same way and under the same rule as if the shipment had been made to him. But, when consignors do not comply with this condition, the notice may be addressed by mail to the consignee at point of delivery, and demurrage will begin as in other cases of notice by mail, and the mailing of such notice shall be sufficient legal notice, whether the consignee actually receives the same or not.

"Rule 6. Railroad companies are authorized to store such property in public warehouses at the expense of the owner, if same is not removed before demurrage charges attach: provided, that storage charges on such freight shall not exceed the demurrage allowed under their rules.

"Rule 7. Whenever the weather during the period of free time is so severe, inclement, or rainy that it is impracticable to secure means of removal, or where, from the nature of the goods, removal would cause injury or damage, such time shall be added to the free period, and no demurrage charges shall be allowed for such additional time.

"This rule applies to the state of the weather during business hours.

"Rule 8. Railroads shall not discriminate between persons or places in storage or demurrage charges. If a railroad company collects storage or demurrage of one person under the demurrage rules, it must collect of all who are liable. No rebate, drawback, or other similar device will be allowed.

"If demurrage is collected by a railroad company at one point on its line, it must collect at all of the places on its line, of those liable under the rules of this commission: provided, that the commission shall hear and grant applications to suspend the operation of this rule whenever justice shall demand this course.

"Rule 9. Whenever a shipper makes a verbal or written application to a railroad company for car or cars to be loaded with any kind of freight embraced in the tariff of said company, stating the article and destination, the railroad company shall furnish same within five days from seven (7) o'clock a. m. the day following such application. Or when the shipper making such application specifies a future day on which he desires notice thereof, computing from 7 o'clock a. m. the day following such notice, the railroad company shall furnish such car or cars on the day specified: provided, that if the movement of cars is suspended

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on account of accident or other cause not within the power of the railroad company to prevent, such period shall be added to the five days time allowed in this rule.

"For failure to comply with this rule the railroad company shall pay to the shipper a delayage charge of \$1.00 per car per day, or fraction thereof, after the expiration of free time, upon demand in writing in thirty (30) days thereafter.

"Rule 10. Cars detained or held on account of shipper's failure to load, or for want of proper shipping instructions, or by reason of improper loading, when loading is done by shipper, shall be subject to demurrage charges of \$1.00 per car per day or fraction thereof, so detained.

"Shipper must be notified as soon as cars improperly loaded are received from him, in which case demurrage shall begin with notification.

"Likewise when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said car or cars are detained or held, and not carried forward within twenty-four (24) hours thereafter, said railroad company shall be liable to said shipper for the payment of \$1.00 per car for each day, or fraction of a day, that said car or cars are thus detained or held.

"Likewise, where cars are detained in transit by being switched to some track between point of shipment and destination, one dollar per car will be charged for each day or fraction of a day of delay thus caused, and no free time will in such case be allowed.

"Twenty-four hours' free time will be allowed for delay at the end of the freight division on which shipments originate, and a like period of twenty-four hours' free time for delivery to connecting lines on joint shipments, and a charge of one dollar per car delayage shall be charged for each day or fraction thereof in excess of twenty-four hours same is held at such freight division or connecting point.

"Rule 11. No other charges shall be made for storage or demurrage, except as provided in the foregoing rules, and, if a railroad company is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage.

"Rule 12. These rules apply only to places where car service rules are in operation.

"Rule 13. When both cars and track are owned by the same party, no charge for demurrage will be made. When private cars are detained on the tracks of other firms or individuals, or on the tracks belonging to or operated by members of this association, or cars belonging to the latter upon private tracks, the established charge will apply.

"Rule 14. At junction points, where consignee's side track is located on one road and cars are received by a connecting road, it shall be the duty of the said connecting road to switch and deliver such cars to the road on which consignee's side track is located within twenty-four hours from 7 o'clock a. m. after the

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time of arrival, and of the road on which consignee's side track is located to switch and place such cars on said side track within twenty-four hours from 7 a. m. after the time of delivery by the receiving road. Failure in this regard shall subject either road to delayage charge of \$1.00 per car per day or fraction thereof: provided, this shall not prevent the charge and collection of established or reasoning switching charges by the road on which said side track is located; and provided, further, that if said side track, without fault of the railroad, is blocked so that delivery cannot be made, the time it remains blocked shall be added to the free time specified herein.

"Rule 15. In all computation of time under these rules, Sundays and legal holidays are to be excluded.

"S. D. McNair, President,

"R. L. Bradley,

"J. C. Kincannon,

"Commissioners.

"Attest: T. R. Maxwell, Sec'y."

Mayes & Longstreet, for appellant.

Henry, Barbour & Henry, for appellee.

WHITFIELD, C. J. The part of the rules of the railroad commission under review here is just this part of rule 10: "Likewise when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said car or cars are detained or held, and not carried forward within 24 hours thereafter, said railroad company shall be liable to said shipper for the payment of \$1.00 per car for each day, or fraction of a day, that said car or cars are thus detained or held." This part of this rule establishes what is well known now as the right to make reciprocal demurrage charges. It is insisted by the appellant that the railroad commission had no power to make this rule. There is no question of interstate commerce even remotely involved in this case. The act authorizing this rule is chapter 82, p. 97, of the Acts of 1898, which provides as follows: "That all laws, acts, and parts of acts giving authority to the railroad commission to supervise common carriers shall also apply to car service associations, or other associations governing or controlling cars or rolling stock of railroads, at whatever place they do business in this state, and the same penalty fixed by law for disobeying the mandates or orders of the railroad commission shall apply to the car service associations as well as to other carriers." The rules in question (a copy of which is attached to the record and which the reporter will set out in full) were adopted June 1, 1904, to be effective June 18, 1904, and the rule here assailed was evidently adopted by the commission under the authority of the said statute of 1898, *supra*. It is also plain, from the language of the rules, that they were adopted with reference to car service associations operating in Mississippi, and not elsewhere, and were deemed necessary for the proper intrastate supervision of such car service associations.

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It is said that the railroad commission has no power to fix charges known as "reciprocal demurrage charges." In section 4291 of the Annotated Code of Mississippi of 1892 it was provided that the commission "may fix all charges and shall supervise and regulate all persons, etc., who may own or operate express, telegraph, or telephone and sleeping car companies." Six years afterwards the act of 1898, above referred to, was passed. Eight years after that section 4843 of the Mississippi Code of 1906 inserted after the words "sleeping car companies," brought forward from section 4291 of the Code of 1892, the following words: "Car service associations, or other associations governing or controlling cars or rolling stock of railroads, etc."—incorporating, in other words, the provisions of the act of 1898, *supra*, in section 4843 of the Code of 1906 as to the supervision of car service associations. There can be no fair and rational construction of these statutes denying to the railroad commission the power to make rules as to reciprocal demurrage. There is no merit in the contention that the commission could only fix these charges after the car service association had first complied the charges and handed them to the commission; in other words, that the commission could not originate the charges. Car service associations have never by any law been required to submit any charges to the railroad commission on this subject. Even if such requirement had been made, however, it is far too narrow a construction of the beneficent powers intrusted in this matter to the railroad commission to hold that that commission is without power itself to originate the charges.

We have heretofore said that no question of interference with interstate commerce is presented in any wise by this record. The case of Atlantic Coast Line Ry. Co. v. Commonwealth, 46 S. E. 911, 102 Va. 599 may be usefully consulted in respect to this contention. The record, however, here presents no such question. It is certainly immaterial whether the commission in Virginia was a constitutionally created department of government, or, as in Mississippi, a legislatively created commission. The method of creation is one thing. The power given to it is another.

We considered this subject of car service associations and their right to impose demurrage charges in Y. & M. V. R. R. Co. v. Searles, 85 Miss. 556, 37 South. 952, 68 L. R. A. 715. We said there: "The main end and purpose of their existence is to prove a benefit to the consignor, carrier, and consignee by expediting the transportation of freight, facilitating its delivery, and insuring prompter and more satisfactory service by and for all alike." Let the words "for all alike" be especially noted. Again, at page 556 of 85 Miss., page 952 of 37 South. (68 L. R. A. 715), we said: "They [the car service associations] are in no wise connected with internal management, or financial affairs, or corporate policy, of any railroad, having not even power of fixing demurrage charges, which it is their duty to assess." Again, on page 543 of 85 Miss., page 947 of 37 South. (68 L. R. A. 715), we said: "Acting under the power thus vested in it, the railroad commission adopted and

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promulgated certain rules in reference to demurrage charges, regulating the amount which could be imposed, and setting out, in detail, the circumstances under which they might rightfully be levied, and then clothed the association with authority to collect in all proper cases. It should be observed that these rules fixing penalties for undue detention of cars were not devised for the benefit of the railroad companies alone, but were framed by the state railroad commission, a tribunal charged by law with the duty of supervising common carriers for the benefit of the public at large." These quotations ought certainly to make it plain that the right of car service associations to assess reasonable demurrage rates, subject to the supervision of the railroad commission, was not maintained by this court for the benefit of the railroad companies, or the car service associations, of the state, but for the benefit of the public alone.

Much is said in the brief of learned counsel for appellant about a supposed distinction between reciprocal demurrage charges, which are characterized as fines and penalties, and demurrage charges which are said to be rightfully imposed by the car service associations under the common-law doctrine of a warehouseman's right to a lien for warehouse charges; and it is earnestly insisted that, without any action of the railroad commission approving demurrage charges, they would be maintained because of this common-law doctrine, and that thus the right of the car service associations to impose demurrage charges exists independently of any statute of the state, or of any action of the railroad commission, but that the right of the railroad commission to fix reciprocal demurrage charges cannot be supported on any common-law doctrine, that there is no lien for them, etc. It will be noted that, on page 543 of 85 Miss., page 947 of 37 South. (68 L. R. A. 715), in the Searles Case, this court characterized the charges for demurrage as "penalties for undue detention of cars," and says they were "devised"—that is, by law—not for the benefit of railroad companies, but for the "benefit of the public at large." It is very ingenious, doubtless, to find other and collateral support for car service charges for demurrage in the common-law doctrine as to the right of warehousemen to a lien on the goods in the warehouse for storage, likening rather fancifully, as it seems to us, the evermoving railroad car to the stationary warehouse. However sound this may be, in the absence of any statute, when the Legislature has acted and dealt with this whole subject matter of demurrage and reciprocal demurrage, authorizing the railroad commission to fix charges for demurrage and charges for reciprocal demurrage, both exclusively in the interest of the public at large, and neither with the slightest purpose of benefiting either the shipper or the consignee in any particular case, it is far too narrow a view to take of such wholesome and beneficent legislation to base support of its action exclusively upon any common-law theory. If there had been no common-law warehouse lien theory, the commission would, undoubtedly, under the legislative authority, have had the right to impose demurrage charges; and,

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if so, undoubtedly it had the converse, and necessarily correlated, power of imposing reciprocal demurrage charges. The purpose of all these charges is to benefit the public at large. On the one hand, the railroad commission, in imposing demurrage charges, had in view the purpose of requiring cars to be unloaded by consignees with all reasonable dispatch and delivered back to the railroad companies that they might go again into the traffic business to haul other freight of other consignees; and, on the other hand, the object of the railroad commission in imposing reciprocal demurrage charges was to compel the railroad companies, conversely, with the same end in view, to move cars, when loaded, with all reasonable dispatch to consignees, in order that they might, when unloaded, be promptly returned to the carrying of the traffic of the country. The purpose was to keep in constant, rapid movement all the cars railroad companies have, the country over, in service everywhere, on their own lines and interchangeably on other lines, so that the traffic of the country should proceed expeditiously, and the things transported by freight cars all over the land be promptly everywhere delivered.

In 20 states reciprocal demurrage measures are pending or have been enacted. Nearly all the organizations in the country representing large shippers have asked for reciprocal demurrage. It would correct many of the most serious defects from which the country is now suffering. The law of reciprocal demurrage is founded in the soundest common sense and the highest spirit of equity. If such laws are rigorously enforced, we will hear no longer of the freight congestion that has been so prevalent throughout the past winter, of thousands of empty cars standing unused in railroad yards in one section of the country, and coal famines in the other for the want of cars. Reasonable reciprocal demurrage rates, fairly enacted and justly and impartially enforced, will result in a quickened traffic the country over, in a just recognition on the part of the railway corporations of the land of what they owe in prompt freight schedules and an abundant supply of cars to the public at large, and in an equally just recognition on the part of the public of their duty promptly to unload traffic borne to them in cars, and send such empties back to aid in further traffic.

We think the action of the court below was correct in every particular, and the judgment is affirmed.

STATE *v.* CUMBERLAND & P. R. CO.

(Court of Appeals of Maryland, April 3, 1907.)

[66 Atl. Rep. 458.]

Corporations — Forfeiture of Charter — Pleading — Answer — Demurrer.—Though Code Pub. Gen. Laws, art. 23, § 367 et seq., prescribing the procedure for the forfeiture of the charter of a corporation, does not in terms authorize the filing of demurrers to an answer to the petition, such a procedure is proper.

Statutes—Subjects—Title—Sufficiency.—Acts 1906, p. 413, c. 257, entitled "An act to amend chapter 469 of the Acts of 1849, entitled, 'An act to incorporate the Cumberland and Pennsylvania Railroad Company,' and to amend the charter of said company so as to prohibit it from allowing its tracks to connect with, or its tracks, right of way or other property, to be used by the Baltimore and Ohio Railroad Company or any other railroad company which is operated, owned or controlled by, or whose railroad property is leased to the said Baltimore and Ohio Railroad Company, except under certain conditions," and providing that, on the railroad continuing to do the acts prohibited, the state's attorney for Allegany county shall file a petition in the circuit court for the forfeiture of the charter and franchises of the company, and directing the court, on the ascertainment of the fact of the commission of the prohibited acts, to decree the forfeiture of its charter, is violative of Const. art. 3, § 29, providing that every law shall have but one subject, which shall be expressed in its title.

Commerce—Power to Regulate—Restrictions on States.*—Acts 1906, p. 413, c. 257, amending the charter of the Cumberland & Pennsylvania Railroad Company so as to prohibit it from allowing its tracks to connect with the tracks of the Baltimore & Ohio Railroad Company, which passes through other states, unless the latter shall arrange its freight charges on coal delivered to it from the former, that the combined freight charges of the two companies shall not exceed the lowest freight charges on coal shipped to the same destination over the line of the Baltimore & Ohio Railroad Company from any point in Pennsylvania or West Virginia, which is as far or further distant from the destination as the point in Allegany county, where the coal is delivered to the Cumberland & Pennsylvania Railroad Company, is invalid as an attempt to regulate interstate commerce.

Appeal and Error—Decisions Reviewable—Nature of Subject-Matter—Forfeiture of Corporate Charter.—Under Acts 1906, p. 413, c.

*For the authorities in this series on the subject of state interference with interstate commerce, see foot-notes appended to *People v. Chicago, I. & L. Ry. Co.* (Ill.), 22 R. R. R. 233, 45 Am. & Eng. R. Cas., N. S., 233; foot-notes appended to *Wells Fargo Express Co. v. State* (Ark.), 21 R. R. R. 471, 44 Am. & Eng. R. Cas., N. S., 471; *American Exp. Co. v. Southern Ind. Exp. Co.* (Ind.), 21 R. R. R. 425, 44 Am. & Eng. R. Cas., N. S., 425; *McGuire v. Chicago, etc., R. Co.* (Iowa), 21 R. R. R. 390, 44 Am. & Eng. R. Cas., N. S., 390.

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257, amending the charter of the Cumberland & Pennsylvania Railroad Company, and providing that the mode of proceeding for a forfeiture of its charter for violation of its provisions shall be the same as is now provided by the General Laws of the state in such cases, and providing that, after the decree of forfeiture has been passed, such proceedings shall be had as are now provided under the General Laws of the state in such cases, and Code Pub. Gen. Laws, art. 23, § 374, providing that either party may appeal from any judgment or determination of the court had on petitions for forfeiture of corporate charters, an appeal may be taken from an order dismissing a petition for the forfeiture of the charter of the Cumberland & Pennsylvania Railroad Company under the act of 1906.

Appeal from Circuit Court, Allegany County; A. Hunter Boyd and Robert R. Henderson, Judges.

Petition by the state against the Cumberland & Pennsylvania Railroad Company. From an order dismissing the petition, the state appeals. Affirmed.

Argued before BRISCOE, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

William C. Devecmon and *William S. Bryan, Jr.*, Atty. Gen., for the State.

Robert H. Gordon, *Ferdinand Williams*, and *Edgar H. Gans*, for appellee.

SCHMUCKER, J. This is an appeal from an order of the circuit court for Allegany county, dismissing a petition filed on behalf of the state of Maryland against the Cumberland & Pennsylvania Railroad Company. The petition was filed under chapter 257, p. 413, of the Acts of 1906, for the purpose of procuring a decree of forfeiture of the charter of the railroad company for its refusal to comply with the provisions of that act. To this petition the railroad company filed an answer, containing 22 paragraphs, to all of which the state demurred, except the fourteenth and twentieth, to which it replied. At the hearing of the demurrers, the court, mounting up to the first error in the pleadings, held the original petition to be bad, and, the state refusing to amend, the order was passed dismissing the petition, and the state appealed.

The petition avers that the railroad company was incorporated by the state by the special act (chapter 469 of the Acts of 1849) which reserved to the Legislature the right to alter, amend, or annul at its pleasure the charter thereby granted, for the main purpose of constructing a railroad into the coal fields of Allegany county to promote their development. That by Acts 1906, p. 413, c. 257, the charter of the railroad company was amended, by adding thereto the following provision: "The Cumberland and Pennsylvania Railroad Company shall not, after the 31st day of May next, permit its tracks to connect with the tracks of the Baltimore and Ohio Railroad Company, and shall not permit its tracks, right of way or other property to be used by the said Baltimore

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and Ohio Railroad Company, or by any other railroad company leased, operated, owned or controlled by the said Baltimore and Ohio Railroad Company, unless the said Baltimore and Ohio Railroad Company shall on or before said date so arrange its freight charges upon coal delivered to it from the Cumberland and Pennsylvania Railroad Company for shipment over its lines, that the joint and combined freight charges of the said two railroad companies shall not exceed the lowest total freight charges upon coal shipped to the same destination over the line of the Baltimore and Ohio Railroad Company, or over the line of any railroad company leased, operated, owned or controlled by the said Baltimore and Ohio Railroad Company from any point in the state of Pennsylvania, or West Virginia, which is as far or further distant from such destination as or than the point in Allegany county, at which such coal is delivered to the Cumberland and Pennsylvania Railroad Company; the intention of this provision being to provide that shippers of coal from Allegany county, in the state of Maryland, shall not be required to pay greater freight charges than shippers of coal from the states of Pennsylvania and West Virginia are required to pay upon their coal hauled equally far or further." That the said act of 1906 also made it the duty of the state's attorney for Allegany county, on and after June the 1st of that year, to cause inquiry to be made whether the Cumberland & Pennsylvania Railroad Company was then permitting its tracks to connect with, or its right of way to be used by, the Baltimore & Ohio Railroad Company, or any other railroad company, leased, operated, owned, or controlled by it, in violation of the terms of said act, and required him if he had reason to believe on or after said date that the Cumberland & Pennsylvania Railroad Company was not complying with the terms and provisions of the act, to institute proceedings in the circuit court for Allegany county to ascertain whether the said railroad company had been guilty of such misuse or abuse of its corporate powers and franchises as would by law authorize and make proper the forfeiture of its charter, corporate powers, and franchises; "the mode of procedure to be the same as is now provided by the General Laws of this state in such cases." That it was further provided by the same act that if, at the trial of any such proceeding instituted by the state's attorney under its provisions, it should be judicially determined that the Cumberland & Pennsylvania Railroad Company was permitting its tracks to connect with those of the Baltimore & Ohio Railroad Company, or of any railroad company leased, operated, owned, or controlled by it, in violation of the provisions of the act, then it should be the duty of the court to decree the forfeiture of the charter of the Cumberland & Pennsylvania Railroad Company, "and that thereafter such proceedings shall be had as are now provided under the General Laws of this state in such cases." The petition then charges that the state's attorney has since June 1, 1906, caused inquiry to be made whether the Cumberland & Pennsylvania Railroad Company is permitting its tracks to connect with, and

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its right of way and other property to be used by, the Baltimore & Ohio Railroad Company, or any other company leased, operated, owned, or controlled by it, and that he has reason to believe that the Cumberland & Pennsylvania Railroad Company has been, and is now permitting its tracks to be so connected and its right of way and other property to be used, in violation of the provisions of the act, and that it has never complied therewith, although the time limited by the act for its compliance with the provisions thereof has long since expired, and that by reason thereof it is liable to a forfeiture of its charter and franchises. A certified copy of Acts 1906, p. c. 257, is filed with the petition as an exhibit, and an inspection of the copy shows that the provisions of the act have been stated with substantial accuracy in the petition.

It is unnecessary, for the purposes of this opinion, to state fully the contents of the answer of the railroad company to this petition for the forfeiture of its charter. Its salient features are the admission that the company has failed to comply with the requirements of Acts 1906, p. 413, c. 257, and the assertion that the act is invalid because of its alleged unconstitutionality. It is insisted in the answer that the act is in conflict with the provision of article 3, § 29, of the state Constitution, which requires that every law "shall embrace but one subject and that shall be described in its title"; and that it is also invalid, under clause 3 of section 8 of article 1 of the Constitution of the United States, because it attempts, in effect, to regulate interstate commerce. The state was, in our opinion, entitled to respond as it did by way of demurrer to the several defenses set up by the answer. The General Laws of this state, prescribing the method of procedure for the forfeiture of the charter of a corporation (article 23, § 367 *et seq.*) do not in terms authorize the filing of demurrers to an answer to the petition, but that course was pursued with the acquiescence of this court in the cases of *State v. Consolidation Coal Co.*, 46 Md. 1, *State v. Easton Social Club*, 73 Md. 100, 20 Atl. 783, and *Fraternal Alliance v. State*, 77 Md. 557, 26 Atl. 1040, and it may now be regarded as a correct mode of pleading. The demurrers to the answer having thus been properly filed, it becomes our duty to inspect the whole proceeding and mount up to the first fault in pleading. The question of the constitutionality of Acts 1906, p. 413, c. 257, on which the state's petition relies, is thus brought before us for determination.

We will first consider whether the statute under consideration is obnoxious to section 29 of article 23 of the Constitution of Maryland. Few, if any, other provisions of the fundamental law of our state have been before us for construction as frequently as this one. We have always given it a broad and liberal construction, and have generally been able to uphold the validity of the statutes alleged to conflict with its provisions, and thus effectuate the Legislative intent. It has, accordingly, been often said by this court that the true meaning of this section of the Constitution

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is that, "if the several sections of the law refer to and are germane to the same subject-matter, which is described in its title, it is considered as embracing but a single subject and as satisfying the Constitution in this respect," and that, "while the title must indicate the subject of the act, it need not give an abstract of its contents, nor mention the means by which the general purpose is to be accomplished." *Mayor, etc., v. Reitz*, 50 Md. 574; *Drennen v. Bank*, 80 Md. 316, 30 Atl. 655. Yet, as was recently said by us in *Kafka v. Wilkinson*, 99 Md. 241, 57 Atl. 617, and *State v. Savings Bank*, 103 Md. 200, 63 Atl. 481, in construing this constitutional provision, the courts "have not hesitated to strike down legislative acts that were clear infractions of its purpose and object. These have been declared to be two-fold; the first is to prevent the combination in one act of several distinct and incongruous subjects, and the second is that the Legislature and the people of the state may be fairly advised of the real nature of impending legislation." Or, as was said in *Stiefel v. Md. Inst. for the Blind*, 61 Md. 148: "Publicity and a knowledge of the true effect and operation of every bill brought before the Legislature are the great safeguards against ill considered and improper legislation. The provision in question is one among many others designed to promote those objects." And in *Luman v. Hitchens*, 90 Md. 23, 44 Atl. 1052, 46 L. R. A. 393, We said: "Though the title need not contain an abstract of the bill, nor give in detail the provisions of the act, it must not be misleading by apparently limiting the enactment to a much narrower scope than the body of the act is made to compass; nor must there be cloaked in the enactment any foreign, dissonant, or irrelevant matter not disclosed in the title."

When tested by the principles thus announced, how does the act now before us stand? Its title is as follows: "An act to amend chapter 469 of the Acts of 1849 entitled 'An act to incorporate the Cumberland and Pennsylvania Railroad Company,' and to amend the charter of said company so as to prohibit it from allowing its tracks to connect with, or its tracks, right of way or other property, to be used by the Baltimore and Ohio Railroad Company, or by any other railroad company which is operated, owned or controlled by, or whose railroad property is leased to, the said Baltimore and Ohio Railroad Company, except upon certain conditions." The contents of the first section of the act, if otherwise unobjectionable, would be fairly germane to the title, as they provide that, after a specified date, the railroad company shall not, except upon certain conditions therein specified, permit its tracks to connect with or its right of way or other property to be used by the Baltimore & Ohio Railroad Company or any other railroad company leased, controlled, or operated by it. The second section provides that, upon the railroad company continuing to do the acts prohibited by the first section the state's attorney for Allegany county shall file a petition in the circuit court for the forfeiture of the charter and franchises of the company, "the mode of procedure to be the same as is now provided by the General Laws of this state in such cases"; and the third section affirmatively directs the

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court, upon the ascertainment of the fact of the commission of the prohibited acts by the railroad company, to decree the forfeiture of its charter. These last two sections do not in any sense provide for an amendment to the charter of the railroad company, but they in effect operate to make, quoad the proceedings authorized by them, radical changes in or departures from the mode of proceeding prescribed by the General Laws of this state relating to the forfeiture of charters of corporations. These general laws are found in article 23, § 367 *et seq.*, of the Code of Public General Laws and they require the authority of the Governor of the state to be given to the state's attorney to institute proceedings for the forfeiture of the charter of a corporation, and, if in such proceedings the legal cause of forfeiture be shown to exist, the court is authorized, if it shall be of the opinion that the public interests require it, to decree the forfeiture of the charter. By sections 2 and 3 of the act now under consideration, not only is the protection of the Governor's discretion as to the advisability of instituting the proceeding withdrawn, but, upon proof of the existence of the situation described in the statute, the court is shorn of the judicial authority and function conferred on it by the General Laws of the state (section 370, art. 23, Code Pub. Gen. Laws) to determine whether the public interests require a forfeiture, and it is imperatively directed to decree of the forfeiture of the charter of the corporation against which the proceeding was instituted. Of these radical and important provisions of the act, its title contains no mention or intimation. That defect in the title in our opinion rendered at least the second and third sections, under which these proceedings were instituted, invalid, because obnoxious to the provision under consideration of the Constitution of Maryland, and afforded the court below proper ground for dismissing the petition.

We will next consider whether Acts 1906, p. 413, c. 257, may be fairly considered as an attempted regulation of interstate commerce, and for that reason invalid. We do not deem it important to here review the successive steps of judicial construction by which the courts have arrived at the interpretation now given to clause 3 of section 8 of article 1 of the federal Constitution, by which the power to regulate interstate commerce was conferred upon Congress. It is sufficient to say that it is now firmly settled by the decisions of the Supreme Court of the United States that, while a state may regulate without federal interference such commerce as begins and ends within its own limits and is not connected with a continuous transportation through or into other states, it is powerless to fix and enforce rates or charges, even as between points in its own territory, for that commerce which crosses state lines under a continuous transportation. *Wabash, St. L. & Pac. R. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *Hanley v. Kansas City & Southern R. R. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; *C. & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *N. & W. R. R. Co. v. Pennsylvania*, 136 U. S. 120, 10 Sup. Ct. 958, 34 L. Ed. 394; *St.*

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Clair County v. Interstate Transfer Co., 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518; Central R. R. of Georgia v. Murphey, 196 U. S. 202, 25 Sup. Ct. 218, 49 L. Ed. 444. It follows, as a matter of course, that, if a state has no power to regulate charges for interstate commerce by direct legislation, it can neither authorize nor require corporations under its jurisdiction to do so. In *Wabash, St. L. & Pac. R. R. Co. v. Illinois*, *supra*, it was held that a state had no power to pass laws intended to regulate interstate commerce, even in the absence of legislation by Congress upon the subject; but that is not material to the present case, as it is a well-known fact that Congress, by the enactment of the several laws known as "Interstate Commerce Acts," has undertaken to provide for the regulation of charges for interstate commerce.

Acts 1906, p. 413, c. 257, now under consideration, does in our opinion attempt to regulate charges for interstate commerce, and is for that reason also invalid. It is apparent from the recitals contained in its preamble that the alleged abuse which it was intended to correct was the rate of charges in force at the date of its passage for the transportation of coal over the Cumberland & Pennsylvania and Baltimore & Ohio Railroads from points in Allegany county to tidewater points. It sought to correct the abuse by requiring the Cumberland & Pennsylvania Railroad Company to procure, by a rearrangement of the joint freight rates of the two railroad companies, such charges to be no greater than those made by them for the transportation of coal shipped over their lines to the same tidewater from equally distant points in Pennsylvania and West Virginia. No testimony was taken in the case showing the precise course and location of the railroads mentioned in the act, but a map used by both sides in the argument before us showed the location of the Cumberland & Pennsylvania Railroad tracks and their points of connection with other railroads; and the course through the states of Maryland and West Virginia, followed by the Baltimore & Ohio Railroad, from Allegany county to tidewater, has been so long established and is so well known to the residents of this state that it may be treated as a "geographical feature of the country," and its location held to be a matter of common knowledge and regarded as having been familiar to the Legislature that passed the act. It would not be possible to carry coal from Allegany county to tidewater points over these railroads, without passing for considerable distances through other states than Maryland. Such transportation of coal, therefore, from Allegany county, as well as from Pennsylvania and West Virginia, to tidewater, would constitute interstate commerce, and it would be beyond the power of this state to regulate or prescribe a rate of charges therefor. Tidewater points are not mentioned in the body of the act as the destination of the shipments of coal therein referred to, but the plain declarations contained in its preamble of the alleged abuse to be corrected by its passage and the condition imposed by its first section, that the "joint and combined freight charges of the said two railroads" shall not exceed the limit therein mentioned, make apparent the result sought to be accomplished by its enactment.

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The appellant's counsel concede that a state cannot pass a statute which amounts to a regulation of interstate commerce, or prescribe rules for conducting it; but they rely upon the proposition, frequently announced by the federal courts, and recognized and relied on by us in *Stevens v. State*, 89 Md. 669, 43 Atl. 929, that a state law is not rendered invalid because it incidently or remotely affects interstate commerce or its instruments. They also insist that, as the state reserved to itself the power to alter or appeal at its pleasure the charter of the appellee, it could exact any condition it saw fit as the price of allowing that charter to continue in force, and had therefore the right to say to the appellee by Acts 1906, p. 413, c. 257, that its charter would be forfeited unless it and its confederate and ally would carry coal to a common destination on as favorable terms from Allegany county as from points in Pennsylvania and West Virginia equally distant with it from that destination; or, in other words, that the state might in that manner indirectly limit, which is to regulate, the rates for interstate transportation of coal from Allegany county, although it was confessedly powerless to do so by direct legislative enactment. To that contention we cannot yield our assent. The great majority of federal cases relied on by the appellant in this connection prove upon examination to have upheld laws passed by the several states in exercise of the police power for the protection of the persons and animals within their borders from the introduction of contagious diseases or dangerous or fraudulent commodities, or for preventing the desecration of the Sabbath or injuring public morals, and to have had only an incidental relation to interstate commerce. The case of *B. & O. Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456, 22 L. Ed. 678, which held valid the stipulation contained in the charter of that railroad company, requiring it to pay to the state one-fifth of its gross receipts from the passenger traffic on its Washington Branch, comes nearer than any other case relied on by the appellant to the one now before us; but in that case, which was admitted by the court to be a close one, the inability of the state to pass any act amounting to a regulation of interstate commerce was asserted by the Supreme Court, and the railroad company was held liable to the state for the sum in controversy, upon the ground that it constituted, not a tax or restriction on the travel or commerce, but a bonus, exacted for the grant of a franchise, to which the railroad company had agreed by accepting the terms of the charter. An accurate statement of the law relating to this subject is found in *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 50, 27 Sup. Ct. 3, 51 L. Ed.—, where it is said by the Supreme Court: "It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of Legislatures having for their object the protection, welfare, and safety of the people, although such laws may have an effect upon interstate commerce. *M. K. & T. Railroad Co. v. Haber*, 169 U. S. 613, 635, 18 Sup. Ct. 488, 42 L. Ed. 878; *Chicago, Milwaukee, etc., Railroad Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Pennsylvania Railroad Co. v.*

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Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the Legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce." We have already said that we regard the passage of the act whose validity is called in question in the present case as a plain attempt to regulate a traffic which is essentially interstate commerce, although the regulation is sought to be indirectly accomplished by an effort to amend the charter of the appellee. We must not be understood, in holding the act to be invalid because unconstitutional in the respects mentioned in this opinion, as passing upon or determining the merits of other defenses to the petition which may be relied on in the answer.

The appellee moved to dismiss the appeal because Acts 1906, p. 413, c. 257, did not provide for an appeal from the action of the lower court on the petition which it authorized to be filed for vacating the appellee's charter. We think the act does provide for such an appeal. Section 1 provides, generally, that mode of proceeding shall be the same as is now provided by the General Laws of the state in such cases, and section 2 specifically provides that, after the decree has been passed, such proceedings shall be had as are now provided under the General Laws of this state in such cases. Now, if we turn to article 23, § 367 *et seq.*, Code Pub. Gen. Laws, and examine the General Laws of the state regulating the proceedings for the forfeiture of corporate charters, we find it distinctly provided, in section 374, that either party may appeal from any judgment or determination of the court had on petitions filed for forfeiture, under this article, within 30 days from the date of the judgment or determination of the court. The motion to dismiss the appeal must therefore be overruled.

For the reasons mentioned in this opinion, the order appealed from must be affirmed.

Order affirmed.

ST. LOUIS & S. F. R. CO. *v.* PUCKETT *et al.*

(Supreme Court of Arkansas, April 15, 1907.)

[101 S. W. Rep. 762.]

Carriers—Carriage of Live Stock—Special Contract—Notice of Claim.*—The failure of a shipper to give notice within the time stipulated in his contract of shipment of a claim against the railroad for damages for delay in furnishing cars, and in transporting the stock to destination after shipment, precludes recovery.

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by Puckett and Arthur against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

L. F. Parker & B. R. Davidson, for appellant.

J. A. Rice, for appellees.

McCULLOCH, J. This is an action against the railroad company to recover damages for delay in furnishing cars for shipment of stock, and also for negligent delay in transporting the stock to destination after shipment.

The controlling questions, so far as we need consider here, are similar to those in case of Railroad Company *v.* Pearce *et al.* (decided to-day) 101 S. W. 760. The evidence shows that notice of the claim for damages was not given within the time stipulated in the contract of shipment, and this prevents recovery. The court erred in refusing to give the eleventh instruction on this point asked by defendant.

Other questions are raised, but we need not discuss them, as this question is decisive of the case here.

Reversed and remanded.

*For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Cornelius v. Atchison*, etc., Ry. Co. (Kan.), 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222; *St. Louis & S. F. R. Co. v. Phillips* (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201; *Atchison, etc., Ry. Co. v. Poole* (Kan.), 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449.

ADAMS EXPRESS COMPANY, Plff. in Err., v. COMMONWEALTH
OF KENTUCKY.

(Argued April 17, 18, 1907. Decided May 13, 1907.)

[27 Sup. Ct. Rep. 606.]

Commerce — In Intoxicating Liquors — State Regulation.* — The agreement of the local agent of an express company to hold for a few days a C. O. D. interstate shipment of intoxicating liquors, to suit the convenience of the consignee in paying for such liquor and taking it away, does not destroy the character of the transaction as interstate commerce, so as to render the express company amenable to prosecution for violating a state local option law.

Evidence—Materiality under Averments of Indictment.—Evidence that the express company knew that a C. O. D. interstate shipment of intoxicating liquors was not ordered by the consignee is immaterial on a criminal prosecution of the express company for violating a state local option law, where the indictment avers that the express company was engaged in the business of a common carrier of packages, and that the shipment and delivery were made and done in the usual course of its business.

In error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction in the Circuit Court of Laurel County, in that state, under an indictment charging an express company with violating the state local option law by carrying and delivering a C. O. D. interstate shipment of intoxicating liquors. Reversed.

See same case below, 27 Ky. L. Rep. 1096, 87 S. W. 1111.

Statement by MR. JUSTICE BREWER:

On February 17, 1904, a grand jury returned into the circuit court of Laurel county, Kentucky, an indictment against Joe Newland and the Adams Express Company, charging that "the said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares, and merchandise, by the method known as express * * * did, in Laurel county, Kentucky, on the 17th day of February, 1904, unlawfully and willfully carry for and deliver to George Meece a parcel, package, shipment, and quantity of intoxicating, spirituous, vinous, and malt liquors * * * to be and which was paid for on delivery at East Bernstadt in said Laurel county, same being at the time a shipment commonly known and called C. O. D. shipments, * * * said shipment and delivery being made and done at the time by said Joe Newland and said Adams Express Company in the usual course of business of said Adams Express Company."

*For the authorities in this series on the question, what constitutes interstate commerce, see foot-notes appended to *Porter v. St. Louis S. W. Ry. Co.* (Ark.), 21 R. R. R. 296, 44 Am. & Eng. R. Cas., N. S., 296.

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Subsequently the action was dismissed as to Newland, and, on a plea of not guilty, the case was tried before a jury and resulted in a verdict finding the company guilty and fixing the fine at \$60. The instructions of the court were as follows:

"Gentlemen of the Jury: 1. If you shall believe from the evidence beyond a reasonable doubt, that the defendant, Adams Express Company, is a copartnership, formed of persons whose names and number were unknown to the grand jury that found this indictment, and who lived out of the state of Kentucky, but are doing business in the state of Kentucky and in Laurel County, Kentucky, and under the firm name and style of 'Adams Express Company,' and that the said Adams Express Company, in this county and within twelve months next before the finding of the indictment herein, knowingly delivered to the witness, George Meece, spirituous, vinous, or malt liquors in quantities of less than 5 gallons at the time mentioned by the witness, and received the pay therefor, and that said company received any pay whatever for its service in that behalf, then you should find the defendant guilty and fix its punishment at any fine not less than \$60.00 nor more than \$100.00, in your discretion, according to proof.

"2. The court says to the jury that if they shall believe from the evidence, beyond a reasonable doubt, that the agent or agents of the defendant's company that accepted, received, transported, or delivered the package mentioned in evidence by the witness Meece, knew, or might, by the exercise of such care as persons of ordinary prudence are accustomed to use in the ordinary transactions of life, have known the contents of the package delivered to the witness, then the defendant company is chargeable with such knowledge, and should be held to know the contents of such package."

Judgment was entered on the verdict, which was affirmed by the court of appeals of the state, 27 Ky. L. Rep. 1096, 87 S. W. 1111, and from that court the case was brought here on writ of error. The act under which the prosecution was had is subsec. 4 of § 2557b, Kentucky Statutes, 1903, commonly called the "C. O. D." law, which is part of the general local option law as amended in 1902, and which reads:

"All the shipments, of spirituous, vinous, or malt liquors, to be paid for on delivery, commonly called 'C. O. D. shipments' into any county, city, town, district, or precinct where said act is in force, shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

Messrs. Lawrence Maxwell, Jr., E. F. Trabue, and Joseph S. Graydon, for plaintiff in error.

Messrs. N. B. Hays and Charles H. Morris, for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court:

The testimony showed that the package, containing a gallon of

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whisky, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the court of appeals, and is beyond dispute under the decisions of this court.

In *Vance v. Vandercook Co.*, 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674, 676, Mr. Justice White, delivering the opinion of the court, said:

“Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.”

In *Rhodes v. Iowa*, 170 U. S. 412, 426, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664, 669, it was held that the Wilson act [26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177] “was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee.”

The court of appeals sustained the judgment upon these facts: Meece testified that he had not ordered the whisky; that he was not expecting any from Cincinnati, but, on going with his brother to the company's office at East Bernstadt, was told that it was there awaiting him; that he requested the agent to hold it until the succeeding Saturday, when he would come, pay for and take it away; and that on that day he did so, paying \$3.85 for the whisky, the express charges having been prepaid at Cincinnati. The court held that, by reason of the retention of the package by the agent, the company ceased to hold it as carrier, and had become a mere bailee or warehouseman; that, therefore, the statute, as applied to the transaction, was not a regulation of commerce; and, further, that, as Meece had not ordered the whisky, there was no contract for the sale of it in Cincinnati, but only by the company at East Bernstadt, in Kentucky; that while there was no testimony showing that the company's agent at Cincinnati knew that the whisky had not been ordered by Meece, yet its agent in Kentucky was so informed, and, therefore, the company was possessed, through its agent, of knowledge that there was no interstate transaction, and, with that knowledge, sold the whisky to Meece. But that the agent consented to hold the whisky until Saturday did not destroy the character of the transaction as one of interstate commerce is settled by the recent case of *Heyman v. Southern R. Co.*, 203 U. S. 270, ante, 104, 27 Sup. Ct. Rep. 104. In that case whisky had been forwarded to a party in Charleston, South Carolina, and after its arrival at Charleston was placed in the warehouse of the railroad company by its agent, and there seized by

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constables, asserting their right so to do under the dispensary law of South Carolina. The point was made and sustained by the supreme court of the state of Georgia, in which state an action had been brought against the company for the value of the goods, that when the goods were placed in the warehouse the carrier was thenceforward liable only as a warehouseman. In passing upon this contention we said (p. 276, ante, p. 107, 27 Sup. Ct. Rep., p. 107) :

“As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution; and thereby comes under the control of the state authority.”

With reference to the testimony as to the knowledge by the company of the fact that the whisky had not been ordered by the consignee, it is sufficient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and of course the company was under no obligation to offer testimony in support of that which the state admitted to be the fact.

We do not mean to intimate that an express company may not also be engaged in selling liquor in a state, contrary to its laws, or that the fact that the consignee did not order a shipment might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question.

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Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HARLEN dissents.

TEXAS & P. RY. CO. *et al.* v. EASTIN & KNOX.

(Supreme Court of Texas, May 15, 1907.)

[102 S. W. Rep. 105.]

Carriers — Deviation from Route — Damages — Liability. — Where plaintiffs requested defendant railroad to ship cattle over a certain route, and defendant, without any excuse, refused so to do, it became liable for all losses accruing to plaintiffs by reason of the shipment of the cattle over a longer route.

Same—Misfeasance of Agent.—Where a railroad agent shipped cattle over a certain route contrary to the express directions of the shippers, he was guilty of misfeasance, and liable for loss occurring by reason of the shipment over the route selected by him.

Subrogation—Payment of Damages by Initial Carrier—Liability of Connecting Carrier.—Where an initial carrier shipped cattle over certain connecting lines contrary to the express directions of plaintiffs, thereby becoming an insurer of the cattle, it was entitled to recover against a connecting carrier for negligence of the latter for which it was adjudged liable, and to be subrogated to the rights of plaintiff.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Eastin & Knox against the Texas & Pacific Railway Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

H. C. Shropshire, C. H. Yoakum, West, Chapman & West, and Theodore Mack, for plaintiffs in error.

Thos. D. Sporr, for defendants in error.

GAINES, C. J. This case was before us at the last term of this court and our determination of the point then presented is reported in 92 S. W. 838, 15 Tex. Ct. Rep. 646. The Court of Civil Appeals had held that the petition for a removal of the case to the Circuit Court of the United States was good, and that it deprived the state court of jurisdiction of the controversy, and therefore declined to proceed further in determining the questions raised on the appeal. 89 S. W. 440. Being of the opinion that the Court

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of Civil Appeals erred in their ruling on the point, we reversed the judgment and remanded the case to that court for their action upon the other errors assigned. Having considered the case after the remand, that court approved the conclusions of fact and law of the trial court, and affirmed the judgment. Our former opinion gives a partial statement of the case, and so much as is there stated will not here be repeated. The defendant the Texas & Pacific Railway Company made the St. Louis & San Francisco Railway Company a party to the suit and impleaded it, praying that, in the event the plaintiffs recovered against it, the Texas & Pacific Railway Company, for the damages that accrued on the line of the St. Louis & San Francisco Railway Company, it have a recovery over against the latter for the amount. The case was tried before the court without a jury, and resulted in a judgment against both the original defendants for \$3,600, and a judgment in favor of the Texas & Pacific Railway Company against the St. Louis & San Francisco Railway Company for one-half of that amount. All parties against whom judgment was rendered appealed to the Court of Civil Appeals, and each of them have applied to this court for a writ of error, which has been granted.

The first assignment of error in the application of the Texas & Pacific Railway Company is to the effect that the court erred in retaining jurisdiction of the cause after the petition and bond for removal were filed. This question was considered and decided by us at the last term of this court adversely to the railroad company. In the opinion then rendered (*T. & P. Ry. Co. v. Eastin & Knox*, 92 S. W. 838, 15 Tex. Ct. Rep. 646) we followed the decision made on the same day in the case of the same company against Huber (92 S. W. 832, 15 Tex. Ct. Rep. 642), in which the same question was involved and was more fully discussed. We adhere to our former conclusion upon this question.

Upon this point, we will, however, add that we have carefully examined the report of the case of *Wecker v. National Enameling & Stamping Co.*, 27 Sup. Ct. 184, 51 L. Ed.—, decided since our former opinion was written, and find nothing in it contrary to our views as therein expressed. In that case Wecker brought suit in a court in the state of Missouri against the enameling company, a nonresident corporation, Harry Schenck, also a nonresident, and George Wettengel, who resided in the state where the suit was brought. The plaintiff sued to recover damages for personal injuries, and alleged a state of facts which showed a joint cause of action against all the defendants. The defendant company filed in the state court a petition for a removal of the cause to the Circuit Court of the United States, in which, among other grounds, it claimed that Wettengel was fraudulently made a joint defendant for the purpose of preventing the removal of the cause, and specifically alleged facts, which, if true, showed that there was no liability on his part. The record having been filed in the Circuit Court of the United State, the issue thus made was tried, and the court found that the facts stated in the application for a removal of the cause were true and that the plaintiff's allegations

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to show the joint liability of Wettengel were fraudulent, and therefore retained jurisdiction of the cause. A writ of error was sued out and the case brought to the Circuit Court of Appeals of the United States, which court certified the question to the Supreme Court of the United States. That court held that the Circuit Court did not err in refusing to remand the cause to the state court, and placed their decision upon the ground, as we understand the opinion, that the petition for removal alleged facts which showed that Wettengel was not a proper party defendant, and that he was fraudulently joined as such. It is clear that the Supreme Court of the United States in the case discussed did not hold that it was sufficient in such a case to support a petition for removal to allege merely that the joinder of the party was fraudulent, without allegations of facts from which that conclusion could be drawn. For the reason that the opinion elaborates the facts alleged in the petition and the conclusion of the court that the facts were established upon the hearing of the issue, it seems to us that it is but a reasonable deduction that the court regarded both the allegation and the proof as necessary to secure a removal.

The case having been tried without a jury, the trial judge found, in substance, that the plaintiffs applied to defendant Tucker, as agent of the defendant the Texas & Pacific Railway Company, for cars to ship their cattle to Tulsa, in the Indian Territory, and informed him that they desired to ship the cattle to Ft. Worth, Tex., and thence over the St. Louis & San Francisco Railway Company to their destination; that the cattle were brought to the depot, and after most of them were loaded on the cars the agent, Tucker, presented to Eastin, one of the plaintiffs, who was in charge of the business for the firm, live stock contracts for shipping the cattle to Paris, Tex., and thence over the line of the St. Louis & San Francisco Railway Company to their destination; that Eastin objected to the shipment by that route, and that he was then told by the agent that he could not route the cattle to Tulsa any other way except by Paris; and that, in order to get their cattle shipped, Eastin signed the contracts. It was also found that the contracts were signed against the will of plaintiff, for the reason that it was necessary that the cattle should be shipped, and it was believed that there was no other route by which they could be sent except by way of Paris. It was further found that there were two other routes by which the cattle might have been transported to Tulsa over the St. Louis & San Francisco Railway Company's lines, one by way of Ft. Worth and the other by way of Sherman, each of which was about 290 miles in length, which was about one-half the distance via Paris, and that the defendant had an arrangement with its connecting line for a through shipment by way of Sherman, but that the plaintiffs did not know this fact. The court further found that the cattle were damaged both by reason of their longer detention on the cars, growing out of the longer transit, and by the negligence of the connecting carrier, after the cattle were delivered to it. In its conclusions of law the court held that the written contracts were obtained by duress, and were there-

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fore invalid, and that the Texas & Pacific Railway Company and Tucker, its agent, were responsible to the plaintiffs for the damages.

It is elementary law that, if a carrier deviates from the route fixed by his contract, he becomes responsible for all loss, which occurs either on his own or his connecting lines. By the deviation he becomes an insurer of the goods. It is also settled that, when goods are delivered to a carrier for transportation to a designated point, it is his duty as a general rule to transport them by the safest and most direct route. If instructed as to the route he selects a different one, he becomes responsible for any loss that may occur in transit. *Express Co. v. Kountze Bros.*, 8 Wall. 342, 19 L. Ed. 457. In the case cited the court say: "If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in defiance of the wishes of the owner of the property, reject the safe, and adopt the hazardous, route." If a carrier becomes liable for all losses by a mere deviation from the route contracted for, for a stronger reason he should be held liable for all losses when shipped over a route contrary to the express instructions of the shipper.

The numerous assignments of error of the Texas & Pacific Railway Company upon the merits are mainly directed to the findings of fact of the trial judge. In some instances it is claimed that facts found are not alleged, and in others that they are not supported by the evidence. As to all these, we deem it sufficient to say that there is enough alleged and enough proved as alleged to show the liability of that company. It is also assigned on behalf of that company that the court erred in holding it responsible for the negligence of the St. Louis & San Francisco Railway Company. As already intimated, we are of opinion that, by refusing to ship the cattle as directed by the plaintiff, the Texas & Pacific Railway Company became responsible for all damages which accrued from the shipment.

In regard to the assignments of plaintiff in error Tucker, we think that in routing the cattle by way of Paris, contrary to the directions of the shippers, he was guilty of misfeasance, and not simply of nonfeasance, and is therefore liable for the loss. This matter was discussed in our former opinion.

In the application for the writ of error of the St. Louis & San Francisco Railway Company no complaint is made of the manner in which it was brought into the case. The only error specified is that the court erred in rendering judgment in favor of the Texas & Pacific Railway Company against it for the damages which occurred on its line. The St. Louis & San Francisco Railway Company were responsible to the plaintiffs for all damages which accrued to their cattle by reason of its negligence while on its hands, notwithstanding the liability of the initial carrier for the same loss. The Texas & Pacific Railway Company having become an insurer of the cattle after they were delivered to its connecting carrier, when it was adjudged to pay for the negligence of the

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latter, it was subrogated to the right of the plaintiffs, and had the right to be reimbursed for what it was required to pay on account of the negligent conduct of the St. Louis & San Francisco Railway Company.

We find no error in the judgment, and it is affirmed.

BERGSTROM v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, May 8, 1907.)

[111 N. W. Rep. 818.]

Carriers—Passengers' Effects—Liability for Loss.*—A carrier is bound by the act of its baggage master who receives and checks a trunk as personal baggage of a passenger with knowledge that it contains goods not baggage, without advising the passenger, ignorant of the extent of his authority, that he exceeds his authority, and is liable for the loss thereof.

Appeal from District Court, Linn County; B. H. Miller, Judge.

Action for value of a trunk checked as baggage over defendant's railway and lost. Verdict was returned for about one-tenth of the damages claimed, and judgment entered thereon. The defendant appeals. Affirmed.

Carroll Wright, J. L. Parrish, and Grimm & Trewin, for appellant.

Smith & Smith, for appellee.

LADD, J. The plaintiff purchased a ticket over defendant's railroad from Cedar Rapids to St. Paul, Minn., and procured two trunks to be checked as baggage, paying for excess weight 70 cents. One of these trunks, with its contents, was lost, and recovery for the value thereof is sought in this action. Defendant's liability for the contents of the trunk constituting plaintiff's personal baggage is conceded. But, aside from such personal belongings as travelers usually carry for their use, comfort, and convenience in making such a journey, this trunk seems to have contained a peculiar assortment of valuables, including a so-called "oriental seal" about 4,000 years old and an art lecture and embroidery of the fourteenth and fifteenth centuries, representing

*For the authorities in this series on the subject of the implied authority of carrier's freight or ticket agents, see foot-notes appended to *St. Louis, etc., R. Co. v. White* (Tex.), 20 R. R. R. 796, 43 Am. & Eng. R. Cas., N. S., 796.

For the authorities in this series on the question what constitutes a passenger's baggage, see foot-notes appended to *Withey v. Pere Marquette R. Co.* (Mich.), 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to *Charlotte Trouser Co. v. Seaboard A. L. Ry.* (N. Car.), 21 R. R. R. 459, 44 Am. & Eng. R. Cas., N. S., 459; foot-notes appended to *Dahrooge v. Pere Marquette R. Co.* (Mich.), 20 R. R. R. 637, 43 Am. & Eng. R. Cas., N. S., 637.

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five saints or apostles, each of which articles was thought by the owner to be worth \$1,000 and all of the estimated value of \$3,708.50.

The evidence was in conflict as to whether defendant's baggage master was advised that articles other than personal baggage were in the trunk when it was checked, and the sole question presented for our decision is whether, conceding that he was so informed, the company is bound by his act in receiving and checking the same as personal baggage, or, as put by appellant: Does notice to a baggage agent of a common carrier that a trunk or other receptacle containing the passenger's baggage also contains items not baggage bind the carrier and make it liable for the value of such items not baggage lost in transit, where the authority of such agent is restricted to that of a baggage agent? Note the inquiry is not whether the agent had authority to decide what was personal baggage, but, conceding that the articles were not such, could he bind the company by treating them as such in receiving them for transportation. It was held in *Weber v. Railway*, 113 Iowa, 188, 84 N. W. 1042, that the carrier will not be held liable in such a case where the passenger knows the agent is prohibited by the company from receiving the articles and checking them for shipment as baggage. While plaintiff knew notice to the company that articles other than personal baggage were in the trunk was essential to render defendant liable therefor in event of loss (see *McElory v. Railway*, 110 N. W. 915), he does not appear to have been advised of any limitation on the agent's authority, or that defendant's rules prohibited the carriage of other than personal baggage on passenger trains. For all that appears, he might have supposed that articles other than personal baggage would be received in connection therewith, or that the matter of determining whether this would be done was left with the baggageman. We are of the opinion that he had the right to suppose the baggage agent was the proper representative of the company to determine in what manner the trunk should be shipped. The company as a common carrier was bound to receive the trunk for transportation, and whether it should be carried as freight, express, or as baggage was for it to decide. It was not unlawful for the company to carry it as baggage, and, as plaintiff desired it to be shipped as such, he must of necessity apply to some one representing the company to ascertain whether it would be so carried. To whom shall a passenger apply in such a case? There can be but one answer to this inquiry, and it is that he may rely upon the agent charged with the duty of receiving and checking baggage for transportation. The company by placing a baggageman in a room, appropriate for receiving trunks and other receptacles for carriage on passenger trains, supplying him with checks to attach, indicating their destination, and allowing him the sole control of checking and determining what shall be loaded on the baggage cars, necessarily holds him out to the public as having authority to decide what will be so checked, loaded and carried as baggage. Otherwise, it must be assumed to be common knowledge of which

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every one is charged with notice that railroad companies do not and will not carry as baggage anything other than the personal belongings of the passenger. This is not true, nor, as it is not unlawful, is it to be assumed in the absence of proof that the companies have any such rule. They are free to carry articles other than personal baggage, as such, and, as every one knows, make a practice of doing so, as for instance in carrying sample trunks of traveling salesmen. These may be carried under special contracts, but, if so, the public is not apprised thereof; and how is a passenger to ascertain this and upon what terms he too may contract to have articles other than personal baggage checked and carried as baggage? Quite naturally by applying to that agent of the company having charge of its baggage department. Certainly the duty of determining whether an article, though not such, may be shipped as baggage, is within the apparent scope of the the baggage agent's authority, and the carrier is bound by his acts with reference thereto, unless the passenger is informed of restrictions upon such authority. The Supreme Court of Massachusetts has held otherwise (*Blumantle v. Railway*, 127 Mass. 322, 34 Am. Rep. 376), though, as we think, without advancing sound reasons for saying that the baggage master in receiving the articles was not acting within the apparent scope of his duty.

The great weight of authority is to the effect that he has implied authority to receive for transportation as baggage articles not ordinarily regarded as such, and that, if he does receive the same for transportation, the carrier will be bound by this act, unless the passenger is advised that in doing so he exceeded his authority. *Minter v. Railway*, 41 Mo. 503, 97 Am. Dec. 288; *Talcott v. Railway*, 54 N. E. 1, 159 N. Y. 461; *Trimble v. Railway*, 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; *Kansas, Ft. S. & M. R. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111; *Waldron v. Railway*, 1 Dak. 351, 46 N. W. 456; 4 *Elliott on Railroads*, § 1649; 3 *Hutchinson on Carriers*, § 1251; 6 *Cyc.* 668.

Affirmed.

COLEMAN *v.* YAZOO & M. V. R. Co.

(Supreme Court of Mississippi, April 15, 1907.)

[43 So. Rep. 473.]

Carriers—Passengers—Liability of Carrier for Acts of Employees.*

—A conductor in charge of a passenger train has a right to defend himself from an attack by a passenger, but he has no right to strike a passenger with a pistol for the use of abusive language toward him.

*For the authorities in this series on the subject of the liability of railroads for assaults on their passengers by their employees, see foot-notes appended to *Ford v. Minneapolis St. Ry. Co.* (Minn.), 21 R. R. R. 182, 44 Am. & Eng. R. Cas., N. S., 182; foot-notes appended to *Garvick v. Burlington, etc., Ry. Co.* (Iowa), 20 R. R. R. 496, 43 Am. & Eng. R. Cas., N. S., 496.

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Railroads — Persons at Stations — Injuries.* — A conductor, while ejecting a drunken passenger at a station, struck him with a pistol, causing it to discharge and injure a bystander, who was struck by the bullet. The passenger at the time and prior thereto had used insulting language toward the conductor. Held, that if the conductor struck the passenger because of his use of abusive language, and not in self-defense, the carrier was liable for the injuries sustained by the bystander.

Trial—Instructions—Modification.—A party requesting correct instructions may complain of the action of the court in erroneously modifying them.

Appeal from Circuit Court, Coahoma County; Sam. C. Cook, Judge.

"To be officially reported."

Action by J. T. Coleman against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The plaintiff brought an action to recover damages for injuries received by him by the discharge of a pistol in the hands of one Myers, the conductor of a passenger train of the defendant railroad company, who, while attempting to eject one Strayhorn, a disorderly negro passenger, at a station, struck him over the head with his pistol, causing it to discharge; the bullet striking plaintiff, who was a bystander at the station, and inflicting the injuries sued for. From the evidence it clearly appears that the passenger ejected had been drunk and unruly and insulting in his conduct on the train before reaching the station at which he was ejected. The conductor testified that at the time he ejected the drunken negro he again became insulting in his language, and he struck him, and that the negro then made a motion as if to draw a weapon, and he began striking him over the head with his pistol. No pistol was found on the negro when arrested immediately after being put off the train. The jury returned a verdict for the defendant, and plaintiff appeals, assigning as error:

(1) The refusing of instructions Nos. 1 and 2 asked by plaintiff, as follows: "(1) The court instructs the jury that if they believe from the evidence that the negro applied violent and abusive epithets to Myers while he was putting him off the train, and that Myers hit him with a pistol for using said language, and not in self-defense, then they will find for the plaintiff all damages he has sustained on account of Myers hitting said negro. (2) The court instructs the jury that a conductor in charge of a passenger train has a right to defend himself from attack or wanton insult, but he has no right to strike a passenger over the head with a pistol for insulting him."

(2) In modifying instructions Nos. 3 and 5 asked by plaintiff, to wit; the modifications being indicated by italics: "(3) The court instructs the jury to find for the plaintiff all damages he has sustained, unless they believe from the evidence that, at the time

*See foot-note on preceding page.

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Myers struck the negro with the pistol, he then had reason to believe and did believe his own life was in real or apparent danger, or that he was in real or apparent danger of great bodily harm at the hands of the negro with a deadly weapon, *or that Strayhorn then and there applied to the conductor grossly abusive or insulting epithets.*" (5) The court instructs the jury that Myers was acting within the scope of his employment and about his master's business at the time the injury complained of by plaintiff was incurred; and unless they believe from the evidence that Myers was acting in necessary self-defense, or was in imminent danger, real or apparent, of bodily harm at the hands of the negro, Strayhorn, with a deadly weapon, then they will find for plaintiff and assess his damages at such sum as shown by the evidence, not to exceed the amount sued for, *unless they further believe from the evidence that Strayhorn applied to said conductor, at the time he struck him, grossly insulting epithets.*"

(3) In granting instructions Nos. 2 and 3 asked by defendant, to wit: "(2) The court further instructs the jury that under the law the defendant railway company's conductor had an equal right with other private citizens to defend himself against any unprovoked assault or gross insult; and if the jury believe from the evidence that such assault was made upon him, or that he was so insulted by one Strayhorn, who had theretofore been a passenger on the defendant company's train, and that in repelling said assault the conductor used his pistol, which was discharged accidentally and plaintiff accidentally shot, as complained of by him, then the jury must return a verdict in favor of the defendant railway company. (3) The court further instructs the jury that the defendant company's conductor had also the right under the law to resent any gross and wanton insult; and if the jury believe from the evidence that one Strayhorn, who had been a passenger on said defendant company's train, grossly and wantonly insulted said conductor, and that he thereupon then and there resented such insult, using such force as was necessary or proper under the surroundings, circumstances, and conditions, the plaintiff cannot then recover for the alleged injury sustained by him, and the jury must return a verdict in favor of the defendant company."

Brewer & Watkins and Harris & Powell, for appellant.
Mayes & Longstreet, for appellee.

WHITFIELD, C. J. The court below plainly erred in refusing the first and second instructions asked by the plaintiff. It also plainly erred in modifying instruction No. 3 and instruction No. 5 asked by the plaintiff, and it also clearly erred in giving instruction No. 2 and instruction No. 3 for the defendant. The point made, that the appellant cannot complain of the modification of his instructions, No. 3 and No. 5 is not well taken, since the instructions were correct as asked, and the modification was error. *Miss. Central Ry. Co. v. Hardy* (Miss.) 41 South 505.

Reversed and remanded.

ST. LOUIS, I. M. & S. RY. CO. *v.* DOWGIALLO.

(Supreme Court of Arkansas, April 8, 1907.)

[101 S. W. Rep. 412.]

Carriers—Assault on Passenger by Brakeman—Liability of Carrier.*

—A carrier is absolutely liable for a wrongful and unprovoked assault on a passenger on a train by a brakeman thereon.

Appeal—Harmless Error—Instructions.—Reference in an instruction, in an action for an assault on a passenger by a brakeman on the car, to the duty of the carrier to protect a passenger from ill treatment by other passengers, is harmless; the sole issue being whether the assault by the brakeman was wrongful and unprovoked.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by Nicholas Dowgiallo against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Oscar L. Miles, for appellant.

John H. Vaughn and *Dan Danielson*, for appellee.

McCULLOCH, J. Appellee instituted this suit against the St. Louis, Iron Mountain & Southern Railway Company to recover damages alleged to have been sustained while a passenger on appellant's train. He alleged in his complaint that he was a passenger on appellant's train; that the train was in charge of a conductor and brakeman, who were servants of appellant; and that said brakeman wrongfully, unlawfully, and maliciously assaulted and beat him while he was on the train as a passenger, and also used abusive and profane language towards him. The defendant answered this complaint, and denied specifically all the averments of the complaint, and, in addition thereto, set up the contributory negligence of the plaintiff, by his own wrongful, willful, and unlawful conduct, brought about and caused whatever injury he may have received from any one upon said passenger train. The case was tried before a jury, and the trial resulted in a verdict and judgment for the sum of \$400 in favor of the plaintiff.

The plaintiff testified, in substance, that while he was a passenger on defendant's train going from Ft. Smith to Jenny Lind, and while he was engaged in conversation with another passenger, Donahue, the brakeman on the train, came into the car and cursed him and beat him severely over the head with a lantern. He testified that he was not disorderly at the time and gave the brakeman no provocation for the assault. Several other witnesses introduced by plaintiff testified to the same effect. Donahue and several other witnesses introduced by the defendant testified that Donahue came

*See preceding case, and foot-note.

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into the car and got upon the arm of a seat to light a lamp, when plaintiff addressed a vile epithet towards him, and he struck plaintiff over the head with the lantern in his hand. There was a sharp conflict in the testimony as to which of the two—plaintiff or Donahue—was the aggressor and at fault in the encounter. According to the testimony of the plaintiff and his witnesses, the assault was unprovoked, and was willfully and wrongfully committed. If Donahue and the other witnesses introduced by defendant are to be believed, plaintiff was entirely at fault in the beginning and provoked the assault by the use of vile language toward Donahue. The jury settled this conflict in favor of the plaintiff.

The court gave the following instructions, at the request of plaintiff, which the defendant objected to, and now assign as error: "(1) You are instructed that it is one of the prime duties resting on a railroad company to protect the passengers from assaults and injuries by its servants, and the question of its liability for a breach of this duty depends upon whether or not the servant acted within the course of his employment. (2) You are instructed that it is the duty of a common carrier not only to carry its passengers safely, but to protect them from ill treatment from its servants and other passengers. A common carrier is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make its passenger's journey safe and comfortable."

Now these instructions, if given in a negligence case, would be erroneous, because they impose too high a degree of care upon the carrier, and in effect make the carrier the absolute insurer of the safety of the passenger. But in this case, where the question involved is whether or not a servant of the carrier willfully and unlawfully assaulted the passenger, the instructions were not prejudicial. While the carrier owes the passenger only a certain high degree of care, so far as concerns protection from injury from other causes, it is the insurer of the safety of the passenger against willful assaults and intentional ill treatment of its servants for whose acts it is responsible. *St. L. & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971. "From the moment the relation commences," says Mr. Hutchinson, "the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance; but, as against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any necessary personal or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well settled law that, when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier must be held responsible, even when the servant has seemingly

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departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty; and that the fact of his being in the employment of the carrier, and engaged in the prosecution of his business, upon his vessel or vehicle, will make the malicious and unauthorized attack of the servant upon the passenger a breach of duty for which the carrier himself may be held liable." 2 Hutchinson on Carriers, §§ 1093, 1094; 4 Elliott on Railroads, § 1638; Thompson on Neg. § 3186; 2 Fetter on Carriers of Passengers, §§ 365, 366; Johnson v. Railway, 130 Mich. 453, 90 N. W. 274; Stewart v. Brooklyn, etc., Ry. Co., 90 N. Y. 588, 43 Am. Rep. 185; Railway Co. v. Divinney, 66 Kan. 776, 71 Pac. 855; Steamboat v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Haver v. Central Ry. Co., 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; White v. Railroad Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; Railroad v. Ray, 101 Tenn. 1, 46 S. W. 554; St. L. S. W. Ry. Co. v. Johnson, 29 Tex. Civ. App. 184, 68 S. W. 58; Gulf, C. & S. F. R. Co., v. Luther (Tex. Civ. App.) 90 S. W. 44; Goddard v. Ry. Co., 57 Me. 202, 2 Am. Rep. 39; Hanson v. Ry. Co., 62 Me. 84, 16 Am. Rep. 404; Railroad Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Lampkin v. Railroad Co., 106 Ala. 287, 17 South. 448.

Mr. Elliott, in discussing the question, says: "It is not merely a question of negligence in such cases, nor is it, strictly speaking, a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part, whether caused by the willful act of an employee or not. A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants and shall not be willfully insulted and harmed by them, and, if he commits the discharge of this duty to an employee, it may well be held to do so at its own peril, notwithstanding the exercise of care on its part in selecting its servants. * * * This leads us to the conclusion that a railroad company is liable for an injury willfully inflicted upon a passenger by its employees while engaged in performing a duty which the carrier owes to the passenger, or in executing the contract, although the company is guilty of no negligence in selecting them, and such act was not strictly within the scope of their employment or line of their duty in the sense that it was done for the carrier or arose out of the performance of their particular duty." In *Steamboat Co. v. Brockett*, *supra*, Mr. Justice Harlan, in delivering the opinion of the court, said that "common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of its own servants in executing the contract."

It is unnecessary for us to define the limits of this doctrine in its application to all the servants of the carrier. It is sufficient to

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say that it applies to a brakeman on a passenger train, whose duty it is to go through the train, with opportunities to come in personal contact with passengers, and who has duties to perform with reference to the comfort or safety of the passengers. The carrier, in intrusting such duties to servants, is bound to see that the passenger is not willfully assaulted and harmed by the servant. "Either the company or the passenger must take the risk of infirmities of temper, malicious wickedness and misconduct of the employees whom the company has placed upon the train and to whom it has committed the discharge of its duty to protect and look after the safety of passengers. A passenger has no control over them, and the company alone has the power to select and remove them. It is therefore but just to make the company, rather than the passenger, take this risk, and to hold it responsible." 4 Elliott on Railroads, § 1638. Authorities are abundant that railroad companies are liable for wrongful assaults upon passengers committed by brakemen, as well as conductors. The cases already cited fully sustain that view.

The second instruction in question is not strictly appropriate in its reference to the duty of the carrier to protect a passenger from ill treatment by other passengers, but this was harmless, because there was no such issue before the jury. The issue was confined to the sole question whether or not the brakeman wrongfully and without provocation assaulted the plaintiff. If he did, the defendant is liable; otherwise it is not liable. The court properly submitted this question to the jury upon instructions requested by the defendant.

The record is, we conclude, entirely free from prejudicial error, and the judgment is affirmed. So ordered.

MISSOURI, K. & T. RY. CO. v. FROGLEY.

(Supreme Court of Kansas, April 6, 1907.)

[89 Pac. Rep. 903.]

Carriers—Live Stock Shipment—Notice of Injury.*—A contract for the transportation of live stock, which makes it a condition precedent to a recovery of damages for loss or injury to such stock resulting from the carrier's negligence that the shipper shall give written notice of his claim before the live stock are mingled with other live stock or removed from the pens at destination, does not apply to animals that are dead when they reach destination, and which were killed through the carrier's negligence.

(Syllabus by the Court.)

*For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Cornelius v. Atchison, etc., Ry. Co.* (Kan.), 22 R. R. R. 222, 45 Am. & Eng. R. Cas., N. S., 222; *St. Louis, etc., R. Co. v. Phillips* (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201; *Atchison, etc., Ry. Co. v. Poole* (Kan.), 21 R. R. R. 449, 44 Am. & Eng. R. Cas., N. S., 449.

Missouri, etc., Ry. Co. v. Frogley

Appeal from District Court, Labette County; Thos. J. Flannelly, Judge.

Action by I. Frogley against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

A. D. Neal, for appellant.

John Madden and *W. W. Brown*, for appellee.

JOHNSTON, C. J. On the evening of November 13, 1904, I. Frogley delivered 53 head of cattle to Missouri, Kansas & Texas Railway Company, at Chetopa, Kan., for shipment to Kansas City. They should have been delivered in Kansas City on the next morning for the market of that day, but did not reach there until the evening of November 14th, after the market had closed. He was unable to sell them until the morning of November 16th, and in the meantime there had been a decline in the market. For the loss of market, the shrinkage of the cattle before a sale could be effected, the extra feed required, and for the death of one steer during transportation, caused by the negligence of the railway company, all amounting to the sum of \$147.93, Frogley asked a recovery. The testimony showing negligence of the company in transporting the cattle to market was sufficient, and hence judgment was given against the company for the amount claimed.

The only defense, or rather the only contention here, is that Frogley failed to give the notice of loss provided for in the shipping contract. Frogley did not base his action on any written contract, nor offer one in evidence, but it was brought out on his cross-examination that he signed a contract containing conditions regulating and limiting his right to bring and maintain an action in order to recover damages for loss or injury to the cattle while they were in charge of the company. This was an irregular way of making a defense, but, assuming that the contract is fairly in the case, it did not preclude a recovery by Frogley. It provided that: "The shipper further expressly agrees that as a condition precedent to his right to recover any damages for any loss or injury to said cattle resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train, or the nearest station or freight agent of the carrier on whose line the injuries occur, before said cars leave that carrier's line, or before the live stock are mingled with other live stock or removed from pens at destination. In his notice he shall state place and nature of the injuries, to the end that they may be fully and fairly investigated, and said shipper shall, within thirty days after the happening of the injuries complained of, file with some freight or station agent of the carrier on whose line the injuries occurred his claim therefor, giving the amount." Under a contract with the same company, and identical in terms, it was held that the provision as to notice did not cover damages like loss of market, or other losses occasioned by the carrier's negligent delay, and which arise after transportation has ended. M., K. &

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T. Ry. Co. v. Fry (Kan.) 87 Pac. 754. See, also, Railway Company v. Poole (Kan.) 87 Pac. 465; Cornelius v. Railway Company (Kan.) 87 Pac. 751. The only loss or injury occasioned during transportation and included in the recovery by Frogley is for the animal which was killed on the way to Kansas City, valued at \$23.97. Is this loss included in the contract? The court instructed the jury that the contract was not binding upon the parties, because the statute prohibits railroad companies from changing or limiting their common-law liability, except by regulation or order of the board of railroad commissioners, and no such order or regulation was shown. Counsel for the railway company make a very strong and plausible argument that the provisions of the contract requiring notice before bringing an action for damages and the like do not limit the common-law liability of the carrier, and they cite Sprague v. Missouri Pacific Railway Co., 34 Kan. 347, 8 Pac. 465; Kalina v. U. P. R. R. Co., 69 Kan. 172, 76 Pac. 438; Express Co. v. Caldwell, 21 Wall. (U. S.) 264, 22 L. Ed. 556; Rice v. Railway Co., 63 Mo. 314; Oxley v. Railway Co., 65 Mo. 629; Dawson v. Railway Co., 76 Mo. 514. However that may be, we are satisfied that the animal killed during transportation did not come within the stipulation requiring notice of the loss. The evidence shows that the death of the animal was due to the negligence of the company, and, of course, no contract can be made which will relieve the company from liability for loss occurring through its misconduct or negligence. If the purpose or effect of the stipulation as to notice was to exempt the company from that kind of liability, it would be contrary to public policy and invalid. The purpose of the stipulation was to give the carrier an opportunity to inspect the injured animals before they were removed from the custody of the carrier and mingled with other animals. The stipulation is upheld upon the ground that after the stock passes from its possession, and is mingled with other stock of a similar kind, or sent to the slaughterhouse, it would be well nigh impossible for the company to obtain satisfactory proof of the nature and extent of the injuries, and therefore the provision which gives the opportunity to ascertain the damages actually sustained is deemed to be reasonable. Contracts of this kind are viewed with considerable strictness by the law, and, unless they are practicable and reasonable, they cannot be sustained. Railway Company v. Poole, *supra*. As to the dead animal, there was no room for the operation of the provision nor any useful purpose to be subserved by a notice. The steer died while it was in charge of the company, and the duty of removing the carcass from the car devolved upon the company. It therefore had the opportunity to ascertain the extent of the loss resulting from its negligence. The removal of the dead steer brought the loss to the attention of the company, and the purpose of the notice was then fully accomplished.

In Baker v. Missouri Pacific Railway Co., 34 Mo. App. 98, it was held that a stipulation in a shipping contract that the shipper would give notice of any claim for damages before the stock was

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removed from the place of its destination had no application to a removal by the carrier or its servants, but covered only a removal by the shipper or owner. In *Railway Company v. Ayers*, 63 Ark. 331, 38 S. W. 515, the Supreme Court of Arkansas had before it a shipping contract like the one in question, involving the matter of notice where some of the animals died before they reached destination. It decided that a notice was not essential to a recovery, and, in doing so, said: "The cattle that were dead in the car before the stock were removed and mingled with other cattle are not within this provision of the contract as to notice. The object in requiring the notice by the shipper of his intention to claim damages to be given before the cattle were removed and mingled with other cattle was to afford the railway company a fair opportunity to examine the cattle before they were removed and mingled with other cattle. As to those that were dead, the company had all the opportunity it could have had to examine them."

As the dead animal was not within the intention of the parties nor the provisions of the contract, the instruction of the court with respect to the stipulation as to notice is immaterial.

We find no error in any of the rulings, and therefore the judgment will be affirmed. All the Justices concur.

MARSHALL v. NASHVILLE RY. & LIGHT CO.

(Supreme Court of Tennessee, March 2, 1907.)

[101 S. W. Rep. 419.]

Carriers—Liability to Person Riding on Pass.*—A carrier, carrying one gratuitously, and therefore occupying as to him the position of a mandatary, and not that of a common carrier, is liable to him, under their agreement that he shall ride at his own risk, only where injury to him is caused by its willful, reckless, wanton, or gross negligence.

Same—Passes—Consideration.—There is no consideration for a pass given by a carrier to one in view only of the fact that he was a member of the city police force.

Appeal from Circuit Court, Davidson County; John W. Childress, Judge.

Action by Mrs. M. A. Marshall against the Nashville Railway & Light Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Robert Vaughn, Jordan Stokes, and Preston Vaughn, for appellant.

J. C. Bradford, R. F. Jackson and J. M. Anderson, for appellee.

*See foot-notes appended to *Nickles v. Seaboard Air Line Ry.* (S. Car.), 20 R. R. R. 755, 43 Am. & Eng. R. Cas., N. S., 755.

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WILKES, J. This is an action for damages for personal injuries, resulting in the death of M. A. Marshall. Upon the conclusion of all the evidence, the trial judge instructed the jury to find for the defendant railway and light company, which was done; and the plaintiff appealed, and has assigned errors.

At the time and on the occasion when the injury occurred, the intestate was riding upon the cars of the railway and light company upon what is called "free pass." The free pass was a pass book with coupons, each of which read as follows:

"Coupon Pass.

"Nashville Railway & Light Co.

"Good only if detached when used and when presented by the person named on cover.

"Complimentary Coupon Pass.

"Not transferable.

"No. 1576.

"Issued 5—10, 1904.

"In consideration of the courtesy of this pass book, I agree to use it subject to the following

"Conditions:

"I will allow no one besides myself to use this pass book, under penalty of forfeiting the same.

"I understand that I ride upon the cars of the company entirely at my own risk of injury or damage.

"M. A. Marshall.

"Not good unless signed in ink by holder of pass book."

The pass book containing the pass coupon used by the plaintiff's intestate on the occasion and at the time of the accident contained, or had printed thereon, signed by him, the following stipulation:

"These coupons will be received as car fare from M. A. Marshall subject to the conditions printed on next page of this cover. Revocable at pleasure of the company.

"Percy Warner, General Manager."

The assignments of error are as follows:

"First. The contract relied on by the defendant, exempting it from liability for negligence, is null and void, because against public policy, under the decisions of this state.

"Second. A contract undertaking to exempt a common carrier from liability for injuries caused by its gross or willful negligence is null and void.

"Third. The lower court was in error in taking the case away from the jury, for the further reason that it was denied by plaintiff in error that the pass upon which her intestate was riding was a gratuity. This was an issue of fact directly raised by the pleadings, and the jury should have been permitted to pass upon it."

The first and second assignments may be treated together, and raise the question whether a common carrier may absolve itself from liability to a person whom it carries free of charge, when the party agrees to such conditions, in consideration of, or as an incident to, such free carriage; and, if it may not absolve itself en-

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tirely, to what extent it may lawfully relieve itself, and from what degree of negligence.

There is a marked distinction in the cases, depending upon whether the carrier receives compensation, or hire, for the carriage, or whether it is done gratuitously, or without compensation.

Thus, in *Kirtland v. Montgomery*, 1 Swan, 452, the liability of the carrier was made to depend upon whether or not he received compensation for the carriage. It is said in that case that it is a material element in this species of contract that it be for compensation, not that any express agreement to that effect is necessary, for it may be as well implied, and the carrier would be entitled to a quantum meruit for it; and it is upon this principle of the right to compensation that the liability of the carrier depends, and that goes to the extent of making him liable as an insurer, and responsible for accidents and thefts, and even to loss by robbery.

And again, this court says, if the defendant is not to be regarded as a common carrier, but as a mere mandatary, is he liable in that character for negligence upon the nondelivery of the goods?

As a general rule, a mandatory, whose engagement is merely gratuitous, is bound only to ordinary negligence, and liable only for gross neglect or breach of good faith.

In *Coward v. Railroad*, 16 Lea, 225, 57 Am. Rep. 227, this court, quoting from *Hutchinson on Carriers* (1st Ed.) § 44, says: "Common carriers will not be permitted, under any circumstances or in any manner, to protect themselves against the consequences of their own negligence in the carriage of either goods or passengers. They may become the carrier of goods gratuitously, and the law will only hold them liable as mandataries—that is, only for losses accruing through gross negligence; but, so long as they are compensated for the carriage, they are common carriers, contract or no contract."

This same distinction and doctrine is forcibly stated in the case of *Northern Pacific Railway Co. v. Adam*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, and in *Boering v. Chesapeake Bay Railroad Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742, which cases cite a large number of authorities in other states, and treat the subject very elaborately.

In *Duncan v. Maine Central Railroad Co.* (C. C.) 113 Fed. 508, the same doctrine is held, and the court says: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the condition on which they are granted."

Another instructive case, holding the same doctrine, is that of *Muldoon v. Seattle City Railroad Co.*, 35 Pac. 422, 7 Wash. 528, 22 L. R. A. 794, 38 Am. St. Rep. 901; and quite an array of cases is cited in the footnote to the main case.

There is some authority to the contrary; but the great weight is with the doctrine as we have stated it. The general result of the cases is that a railroad or street car company is not liable for ordinary negligence to a party who is a passenger upon the road.

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riding upon a free pass, or coupon, such as was used in the present case. See the authorities heretofore referred to and the large number of cases cited therein.

It is said, however, that a contract undertaking to exempt a common carrier from injuries caused by his gross or willful negligence is null and void. It is conceded by the street car company in this case that this is a sound proposition of law, treated as an abstract question, and that, if there is any evidence tending to show that the injuries suffered by plaintiff's intestate were the result of the gross or willful negligence on the part of the defendant, then it would have been the duty of the court to have permitted the case to go to the jury on that issue.

It is said, however, that the proof shows that there was no negligence, and that the accident was the result of a condition which the highest care and skill could not have provided against. If this proposition be true, then the carrier would not be liable, whether the plaintiff were riding free or as a paid passenger, since there could be no right of recovery on the part of the passenger, unless there was negligence on the part of the company.

We are of opinion that, in order to render the company liable to an individual using and riding on such a pass, there must be on the part of the company such negligence as may be denominated willful, reckless, or wanton, or negligence so gross as to amount to willfulness, recklessness, or wantonness, and for negligence short of this the company is protected by the terms of the pass, which constitute the contract of carriage. In such case the company, as to such individual, occupies the position of a mandatary, and not that of a common carrier, so far as its liability for negligence is concerned. *Kirtland v. Montgomery*, 1 Swan, 452; *Coward v. Railroad Co.*, 16 Lea, 225, 57 Am. Rep. 227; *Hutchinson on Carriers* (1st Ed.) § 44; *Muldoon v. Seattle City Railroad Co.*, 35 Pac. 422, 7 Wash. 528, 22 L. R. A. 794, 38 Am. St. Rep. 901.

The court is of opinion that there is no evidence of gross, willful, or reckless negligence in this case, either in the construction and maintenance of the trolley wire, or in the conduct of the conductor and motorman when the accident occurred.

It is said that the court should have left to the jury whether or not the pass upon which the deceased was riding was a pure gratuity, or whether the deceased was either directly or indirectly a passenger for hire.

A party may use a pass for which he does not pay in money, but for which some valuable consideration is given. In such case, he is a passenger for hire, such as persons traveling on passes with stock, news agents, express agents, postal clerks, employees of the road going to and returning from work, in all of which cases no money consideration is given for the pass, but there is, nevertheless, such a consideration as makes the party a passenger for hire, and such as prevents the pass from being a mere gratuity.

One of the assignments of error in this case is that the pass was not a mere gratuity but that it was given for

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a valuable consideration; and in this connection it is said that the deceased was a member of the police force of Nashville, being chief of detectives, and that to this class of persons the company, as a rule, issued passes, which were based upon a valuable consideration. In other words, this pass was given, like others of its class, to encourage and to induce members of the police force, like the intestate, to ride upon the cars, and to be frequently about them, because their presence tended to preserve peace and good order for the passengers and to protect the interest and operation of the road.

We are of opinion that such a motive on the part of the road cannot be considered a valuable consideration, because the expected benefits are too remote, contingent, and uncertain to be so classed; and the pass must, therefore, be considered and treated, as it purports to be, a mere gratuity or compliment.

Upon the whole case, we are of opinion that the trial judge was correct in directing a verdict as he did; and the judgment of the court below is affirmed, with costs.

I concur with the majority in the principles of law laid down in this case, and in the result reached. I am of opinion, however, that there is evidence in the case from which the jury might have inferred negligence, and that the question of negligence is one for the jury to determine, both as to its existence and as to its grade. The case should, therefore, have been properly left to the jury. But I am of opinion that the negligence in this case, if any, was neither gross, nor willful, nor wanton, nor reckless, and that the merits of the case have been reached, and I therefore concur in the result.

MISSOURI PAC. RY. CO. v. PERU-VAN ZANDT IMPLEMENT CO.

(Supreme Court of Kansas, Oct. 6, 1906.)

[87 Pac. Rep. 80.]

Carriers—Lien for Freight—Damage to Goods—Conversion.*—

Where a common carrier becomes liable to the consignee of goods for damages to the property received in transit, and the amount of such damages equals or exceeds the freight bill on the damaged goods, the lien of the carrier is thereby extinguished, and the consignee is entitled to the possession of such goods without payment of freight, and in such a case refusal of the carrier to deliver the goods to the consignee upon demand constitutes a conversion.

(Syllabus by the Court.)

On rehearing. Affirmed.

For former opinion, see 85 Pac. 408.

GRAVES, J. This case was decided at the March sitting of this

*See extensive note, 22 R. R. R. 247, 45 Am. & Eng. R. Cas., N. S., 247.

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court, 1906. See 85 Pac. 408. A rehearing was granted upon the proposition of law stated in the second syllabus, which reads: "When a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceeds the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods, without payment of freight, and a refusal by the carrier to surrender possession upon such demand is wrongful, and amounts to a conversion."

The plaintiff in error urgently objects to this statement of the law, and insists that it is opposed to both reason and authority. This particular point received very little attention at the first argument of the case, and very few cases directly in point have since been cited by either party. Under some of the older cases, especially in England, the consignee was required to first pay the freight and bring an action of damages afterwards. This rule obtained because of the law then existing, concerning the forms of action in which a set-off for unliquidated damages might be litigated. Under the modern procedure of this country, however, and especially in this state, where the policy is to litigate every controversy between the parties, in the same suit, and thereby avoid circuitry and multiplicity of actions, this class of cases cannot be controlling. 25 Am. & Eng. Enc. of Law (2d Ed.) 484. Apparently the plaintiff in error relies upon the case of Miami Powder Co. v. Port Royal, etc., 38 S. C. 78, 16 S. E. 339, which may also be found in 21 L. R. A. 123, and the cases therein cited. This case is cited in the former opinion in support of the proposition in question. The citation was made upon the assumption that the syllabus of the case stated the law as given in the opinion, but on further examination they do not seem to be alike. We have since carefully examined that case, and find the only question really decided by it is that the evidence in the case did not justify the instructions given. The trial court in that case adopted the law as stated by this court, and to which the plaintiff in error objects. In doing so it followed Ewart v. Kerr, Rice (S. C.) 203, which had been affirmed in 2 McMul. (S. C.) 141. Neither of these cases have been modified or reversed, but, so far as we have been able to ascertain, still stand as the law of South Carolina. The Supreme Court did not reverse the trial court because the law given was erroneous, but for the reason that, if correct, it did not apply to the facts of that case, as the evidence did not show whether the damages claimed equaled or exceeded the freight bill. The court made the suggestion, apparently for the future guidance of the trial court, that the rule of law stated in the cases of Shaw v. Railroad, 5 Rich. Law (S. C.) 462, 57 Am. Dec. 768; Nettles v. Railroad, 7 Rich. Law (S. C.) 190, 62 Am. Dec. 409, was more applicable to the facts of that case than the one followed. This suggestion is not inconsistent with the former cases followed by the trial court, nor with the rule stated by this court in the syllabus under consideration. In the case of Shaw v. Railroad, *supra*, the goods shipped consisted of 10 barrels of molasses. Two of them

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leaked during transit. The consignee accepted eight barrels, but refused to accept the two that were leaking, and sued the carrier for the value of two full barrels. It was held that the plaintiff should have received all of the barrels, and sued for the value of the amount of loss by leakage. In the case of *Nettles v. Railroad, supra*, the carrier tendered the goods to the consignee, who refused to accept them, and sued for the value of the entire shipment. It was held that he ought to have received the goods, and sued for the difference in their value when tendered, and when they ought to have been delivered. The damages were caused by delay in transit, but no question as to payment of freight was considered. The discussion relates to the proper measure of damages. The case cannot, therefore, be considered of any weight as an authority here. In the case of *Miami Powder Co. v. Pt. Royal, supra*, the goods shipped consisted of kegs of powder, a few only were injured, the consignee refused to receive any of them, and pay the freight, but sued in trover for the value of all. It will be observed that the damages complained of were not the result of delay in delivery, but because of a direct injury to a part of the goods. In such a case, it is not unreasonable to say that when freight is shipped in bales, barrels, kegs, or other forms, where the injured parcels can be readily separated from those which are uninjured without affecting the value of the shipment as a whole, the rule as to whether the consignee would be entitled to the possession of the entire shipment without payment of freight might be different from that which should be applied when the entire shipment consists of a single machine, which cannot be separated without destroying its value. We conclude, therefore, that the case of *Miami Powder Co. v. Pt. Royal, supra*, does not decide the question here in controversy either way. The facts in the two cases are dissimilar. The other cases cited by the plaintiff in error relate to what constitutes a conversion, and to the proper measure of damages where goods are injured in transit, by the negligence of the carrier.

In argument the plaintiff in error objects to the rule stated by this court because of the embarrassments which may be imposed upon carriers by dissatisfied shippers. But the rule contended for by it would, in our view, enable carriers to impose much greater embarrassment upon shippers. A rule which would require a shipper to pay his debt to a carrier, who owes him a greater sum, does not seem to be a just and fair way to settle a controversy. It is conceded by the plaintiff in error that in an action by the carrier for the freight, after the goods have been delivered to the consignee, damages to the goods might be collected, and that replevin would lie against the carrier for the goods without payment of freight if the damages equaled or exceeded the freight bill; but it insists that a suit for the value of an entire shipment will only lie when there has been a conversion, which has not been shown here. On the other hand, the defendant in error claims that both reason and authority, sustain the law as stated in the syllabus, objected

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to by the plaintiff in error. He argues that the right of the carrier to possession rests upon its lien for freight; that where the carrier becomes liable to the consignee, on account of damages to the property while in transit, in a sum equal to or greater than the freight bill, the lien thereby becomes extinguished, because, "where there is no debt, there can be no lien." He argues, further, that under such circumstances the right of possession is in the consignee, and a refusal of the carrier to deliver upon demand constitutes conversion. In support of these contentions he cites the case of *Dyer v. Grand Trunk R. R.*, 42 Vt. 441, 1 Am. Rep. 350. This was an action of replevin, but the court said in substance that, when the damages to the goods equal the freight bill, one debt offsets the other, and the lien of the carrier vanishes, leaving the right of possession in the owner. In the case of *Moran Bros. v. Northern Pacific R. R.*, 53 Pac. 50, the Supreme Court of Washington said: "If the carrier has negligently delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may obtain replevin without a tender; and the claim for freight and the claim for damages may be adjudicated in the replevin suit." *Cobbey on Replevin*, § 515, reads: "The right of a carrier to retain property until its charges for carriage are discharged rests upon the performance of the contract of carriage upon its part. If it has negligently delayed the delivery of the property at its destination, or otherwise subjected itself to liability for damages to the consignee in respect to the property carried, that would disentitle it to the extent of such liability to demand and recover freight; and if the damage should exceed the amount of the freight to which it would otherwise be entitled, of course, it would not be entitled to demand and recover anything for the carriage of the property. And in such cases the owner or consignee may maintain replevin without a tender, and the claim for freight by the defendant, and the claim for damage by the plaintiff, at least to the extent of the freight charge, may be adjudicated in the replevin suit." The case of *Bancroft v. Peters*, 4 Mich. 619, is to the same effect. In the case of *March v. Union Pac. Ry. Co.* (C. C.) 9 Fed. 873, Judge Hallett of the United States District Court for Colorado, held that trover would lie for the value of freight held by a carrier under a lien which did not exist. In 1 *Jones on Liens* (2d Ed.) § 331, it is said: "The carrier's lien may be defeated by an injury to the goods carried happening by the carrier's fault to an amount larger than his charge for freight. His right to freight and to detain the goods for its payment results from his performance of the contract to carry the goods. If he fails to carry the goods and have them ready for delivery, he cannot claim his freight." 8 Am. & Eng. Enc. of Law (1st Ed.) 978, § 6. The proposition seems reasonable that, when a carrier's lien is gone, subsequent retention of possession of freight against the wish of the owner is wrongful, and the owner may thereafter sue for the possession thereof in replevin, or for the value as upon

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conversion. We understand the general rule to be that a refusal to deliver the possession of personal property upon demand by the owner, who has the right to possession, amounts to a conversion, and the owner may sue for the value at once. 28 Am. & Eng. Enc. of Law (2d Ed.) 705; *Roberts v. Yarboro*, 41 Tex. 449; *Briggs v. Haycock*, 63 Cal. 343; *Transportation Co. v. Sellick*, 52 Ill. 249; *Singer Mfg. Co. v. King*, 14 R. I. 514.

We conclude that the rule stated in the syllabus is more in harmony with modern procedure, and more in consonance with fairness between the parties, and less liable to lead to embarrassments, than the rule contended for by the plaintiff in error, and therefore do not feel inclined to make any change therein. All the Justices concurring.

MILLER v. ATLANTA & CHARLOTTE AIR LINE RY. CO.

(Supreme Court of North Carolina, May 14, 1907.)

[57 S. E. Rep. 345.]

Carriers—Carriage of Passengers—Personal Injuries—Contributory Negligence.*—In an action for injuries to a passenger in a collision caused by backing of cars against a standing caboose, in which plaintiff was sitting, with the knowledge and consent of the carrier's servants, in order to show plaintiff guilty of contributory negligence, the jury must find that he knew or should have known that the front part of the caboose where he took his seat was not intended for passengers; that it was more dangerous than the rear part; that, under all the circumstances, he failed to exercise ordinary care in taking his seat there, with the knowledge of the flagman and without warning from him; and that his conduct proximately caused or concurred in causing the injury.

Appeal from Superior Court, Mecklenburg County; W. R. Allen, Judge.

Action by Jasper Miller against the Atlanta & Charlotte Air Line Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

*For the authorities in this series on the subject of the contributory negligence of passengers in riding in dangerous places or positions, see foot-notes appended to *Chicago City Ry. Co. v. Schmidt* (Ill.), 21 R. R. R. 721, 44 Am. & Eng. R. Cas., N. S., 721; foot-notes appended to *Wabash River Traction Co. v. Baker* (Ind.), 20 R. R. R. 493, 43 Am. & Eng. R. Cas., N. S., 493.

For the authorities in this series on the subject of the degree of care required of a passenger for his own protection, see foot-notes appended to *Weaver v. Pennsylvania R. Co.* (Pa.), 21 R. R. R. 749, 44 Am. & Eng. R. Cas., N. S., 749; *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Interurban Ry. & Term. Co. v. Hancock* (Ohio), 21 R. R. R. 439, 44 Am. & Eng. R. Cas., N. S., 439.

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This case was before us at a former term. 143 N. C. —, 55 S. E. 439. The plaintiff entered a caboose car of the defendant, which was attached to one of its freight trains at Gastonia, as a passenger, intending to go to Charlotte. The jury, upon issues submitted by the court, found that he was a passenger, and that he was injured by the negligence of the defendant, but that he was guilty of contributory negligence. The caboose was divided by a partition into two compartments, the rear one for passengers and the front one for the employees and their tools and implements. The two were constructed somewhat alike, each having a seat on the side, running lengthwise of the car. The day on which the plaintiff was injured was warm, and the rear compartment of the caboose was uncomfortable, not being as well ventilated as the front. The plaintiff went into the front compartment; there being a door in the front of the car, and a window on the side and both being open. He sat on the side seat and commenced to make entries in his notebook. After he had taken his seat, a flagman, apparently in charge of the caboose, asked him if he was going to remain on the car. Plaintiff replied that he was going to Charlotte, whereupon the flagman asked him to look after the caboose while he was away, which he consented to do. When the plaintiff had been seated about 20 minutes, the caboose was jerked violently by the backing of the freight cars against it with "tremendous force," and he was thrown against the door, which was out of order, his hand was caught and badly lacerated, torn, and mashed, so that he suffered great pain; the hand being permanently injured. The plaintiff testified that the conductor consented to his boarding the caboose where it was, though he politely notified the plaintiff that it would be drawn up to the station, and, if he waited, he could get on it there. The plaintiff requested the court to give the following instruction, which was refused, except as given in the charge: "It is not negligence per se for a passenger to enter a car at a station in apparent readiness to receive passengers a few minutes ahead of the time fixed by the rules of the company for receiving passengers; nor is it negligence per se for the plaintiff, after boarding the caboose where he did, to fail to look to see if cars were being backed against the caboose, nor was it negligence per se for the plaintiff to get on the caboose if it was detached from the engine at the time he entered, nor was it negligence per se for the plaintiff to get into the apartment of the car he did when he entered the caboose, and if the jury so find, and further find that the plaintiff was in the exercise of ordinary care when he entered the car and when he was injured, then the jury should answer the third issue 'No.' " The court charged the jury as follows: "On the third issue the burden is upon the defendant to satisfy you, by the greater weight of the evidence, that the plaintiff was negligent, and that that negligence was the proximate cause of the injury to him. The question of the contributory negligence of the plaintiff is to be determined by his conduct after he got upon the car and dependent solely on that. It was the duty of the plaintiff to exercise his intelligence and senses

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and to observe the condition of the car, and if, by the exercise of ordinary care, he could have discovered the rear part of the car was provided for passengers and the front not, and for his own convenience and comfort he went to the front section and sat down near the door, he was guilty of contributory negligence, and you will answer the third issue 'Yes.' If, however, either end was used for passengers, it would not be negligence for the plaintiff to go into the front end of the car. If, however, he could not discover, by the exercise of ordinary care, that the front end of the car was not used for passengers, then it would not be negligence to go in there, but it would be his duty then to exercise ordinary care, if, by the use of ordinary care, he could discover that it was dangerous." There was judgment for the defendant upon the verdict, and the plaintiff appealed.

Brevard Nixon and Maxwell & Keerans, for plaintiff.
Wm. B. Rodman, for defendant.

WALKER, J. (after stating the case). The only question that requires consideration in this case is whether the instruction of the court, as to contributory negligence, was correct, for the jury found that plaintiff was a passenger and that the defendant had been negligent in the management of the train. The instruction makes the contributory negligence of the plaintiff turn solely upon whether, by the exercise of ordinary care, he could have discovered that the rear compartment was intended for passengers and the forward compartment for employees, and whether also he went into the front section for his own comfort and convenience and sat down near the door. A plaintiff cannot be said to have contributed to his own injury by his negligence, unless he has failed to exercise that degree of care which a man of ordinary prudence would use for his own safety in the same or substantially similar circumstances, and, further, unless his want of care has proximately contributed to causing the injury of which he complains. The question upon the second issue was not merely whether the plaintiff knew or should have known that the rear compartment was for the accommodation of passengers, and, for that reason, he should have taken a seat therein, but the inquiry should have been broadened so that the jury should have further ascertained and found whether the front compartment was more dangerous than the rear one, and whether, by taking a seat therein, the risk and peril of plaintiff's position in the car was thereby enhanced; whether, also, a man of ordinary prudence would have acted as he did under the circumstances, and finally whether his conduct proximately caused or concurred in causing the injury. 1 Thompson on Negligence, § 216. It was not per se negligence to take a seat in the front compartment, even though it was intended for the employees of the defendant and the storage of their tools. *Creed v. Railroad*, 86 Pa. 139, 27 Am. Rep. 693; *Burr v. Railroad*, 64 N. J. Law, 30, 44 Atl. 845. Besides, the instruction of the court ignores the fact, of which there was evidence, that the flagman who had temporary charge of the car saw the position

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occupied by the plaintiff, and made no objection to his continuing in it, but, instead, requested him to watch the car during his absence. 6 Cyc. 641.

The claim of the defendant is that the plaintiff was guilty of such negligence in going into the front section of the car as to bar his recovery for the injury he there received, however negligent the defendant itself may have been. This same contention was made in *Webster v. Railroad*, 115 N. Y. 112, and in reference to it the court said: "There would be some basis for this claim if his [plaintiff's] injury could be traced to his presence in that car. But, if his presence there did not have any relation to the injury, then it furnishes no defense to the defendant. It does not appear that the baggage car was, on the occasion of the collision, any more dangerous than the passenger coach." In *Creed v. Railroad*, 86 Pa. 139, 27 Am. Rep. 693, the facts were that the plaintiff's intestate was a passenger on a mixed freight and passenger train of the defendant. He went into the caboose, the hindmost car of the train, in front of which were the passenger coaches, so that there was ready and easy access from the latter to the former. The caboose car was one set apart and especially designed for the use and occupancy of the employees engaged in running the train, and by the rules of the company no other persons were permitted to enter it. The intestate was killed by the caboose being upset; and with reference to these facts the court said: "Was Creed's position, under ordinary circumstances, which a man of ordinary prudence ought to see, and guard against, as safe as a seat in a passenger car? If it was and, as we have said, there is no evidence to the contrary, then negligence cannot be predicated of the fact of his being in the caboose." This left the question as to whether the intestate had been negligent in taking a seat in the caboose to the jury. It was further held that there was no contributory negligence because it did not appear that the intestate's position in the caboose had any causal connection with the accident, or, in other words, that his being in the wrong car was the proximate cause of his death. The court cited in support of the decision in that case *O'Donnel v. Railroad*, 59 Pa. 239, 98 Am. Dec. 336, *Railway v. Chenewith*, 52 Pa. 382, 91 Am. Dec. 168, *Carroll v. Railroad*, 1 Duer (N. Y.) 571, *Washburn v. Railroad*, 3 Head (Tenn.) 638, 75 Am. Dec. 784, and *Jacobus v. Railroad*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360, which authorities seem strongly to sustain the conclusion therein reached. It is not necessary that we should in this case go so far as the courts did in those we have cited, but it is quite sufficient for our purpose to show that the liability of this defendant for the plaintiff's injury, if it was guilty of negligence as the jury found, depended upon whether the jury should also find, under the third issue as to contributory negligence, that the plaintiff in going into the front compartment of the caboose exercised the care of an ordinarily prudent man under the circumstances, or that, if he was negligent in taking a seat in the front instead of the rear part of that car, whether his injury was proximately caused by that negligence, or by the negligence of the defendant.

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These questions are discussed with singular clearness and force by Judge Magie, for the court, in *Railroad v. Ball*, 53 N. J. Law, 283, 21 Atl. 1052, the facts of which closely resemble those in our case, and in principle we do not see how the two cases can well be distinguished. Indeed, all the cases we have cited, including, of course, the last, while they clearly support the propositions we lay down as applicable to this case, go far beyond what we deem it necessary to declare in order to hold that the instruction of the court upon the issue of contributory negligence was erroneous. For example, in the case last cited, it is said: "If such an inference [that an invitation had been given to the plaintiff to ride where he was at the time of the accident] were drawn, I think that negligence could no more be imputed to the act of taking and retaining that place than it could be to the act of taking a seat in a passenger car, so far as concerned danger from causes extraneous to the car. If any invitation called him to a place of obvious danger from such or other causes, apparent to his senses, and to take which could only be done by a failure to exercise care for his safety, negligence might be imputed to him notwithstanding an invitation. If the place to which he was invited may or may not be prudently taken, a question for the jury would arise. Where a passenger, under similar circumstances, rode on the platform, and was there injured in a wreck of the train, it was held that a question for the jury arose, and a finding that the act was not negligent was supported. As will be seen, I do not think that danger from extraneous causes was at all apparent or obvious to one invited to the baggage compartment. But the case in hand was put to the jury, not as a question of implied invitation, but upon the assumption that plaintiff occupied the baggage compartment merely with the consent and permission of those in charge of the train. This conclusion was necessary from the evidence, and the trial judge had a right to base instructions to the jury thereon. The instruction thereon was that, while plaintiff's act in riding in that compartment would have negligently contributed to any injury received from causes inherent in the construction and use of it as a place for receiving and carrying baggage, there was no contributory negligence to be imputed to that act in respect to injuries received from causes *ab extra*"—citing *Railway v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, 7 Am. St. Rep. 798, and *Willis v. Railroad*, 34 N. Y. 670. The court in *Railroad v. Ball*, *supra*, after remarking that whether the plaintiff's position, if wrongful, was a contributing cause, or merely the occasion or opportunity of the injury done by the defendant's wrong, was also a question in the case, made further observations which are pertinent to the facts of the case at bar: "But let us assume," says the court, "that the jury, had the question been submitted to them, might have found that plaintiff's act did contribute to his own injury as a cause thereof. To exonerate defendant from liability for its negligence, which also caused plaintiff's injury, it is not sufficient that plaintiff, by his act contributed thereto, but it must further appear that in doing that act he was at fault,

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and guilty of what the law calls 'negligence.' Negligence is the absence of that care for safety which the law exacts from him who seeks redress for an injury done him by the negligence of another. In this respect the law exacts such judgment respecting dangers and risks incident to the circumstances as a reasonable man would form, and such vigilance in observing the approach of danger, and such care in avoiding it, as a prudent man, reasonably careful of his safety, would exercise." Judge Thompson substantially states the true doctrine in the same way. The general rule is that a passenger who, without the consent of the carrier, selects a place on the carrier's vehicle which is obviously not intended to be occupied by passengers, and, while in such position, receives an injury directly traceable to hazards peculiar to that position, cannot recover damages of the carrier, for he is deemed in law to accept the risks incident to the position which he thus voluntarily assumes, but the passenger's conduct, if negligent, will not bar a recovery of damages, unless it was the proximate cause of his injury. 3 Thompson on Negligence, § 2942. "However negligent he may have been in placing himself in an improper position upon the carrier's vehicle, if his negligence did not contribute in any degree to the accident which befell him, but if that accident was the result of the negligence of the carrier, he may recover damages." *Ib.*, 1 Thomp. Neg. § 216. Many authorities might be cited in support of the principles thus stated, but a few only will suffice. *Keith v. Pinkham*, 43 Me. 501, 69 Am. Dec. 80; *Paquin v. Railway*, 90 Mo. App. 118; *Burr v. Railroad*, 64 N. J. Law, 30, 44 Atl. 845; *Wilmott v. Railway*, 106 Mo. 535, 17 S. W. 490; *Moore on Carriers*, p. 854; *Railway v. State*, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454. In this case it appears that the two compartments of the caboose were constructed and arranged substantially alike, each having a seat running lengthwise of the car. It was for the jury to say whether there was anything peculiar to the front compartment which rendered it more dangerous to passengers than the rear one, and, if there was, then whether the plaintiff, under all the facts and circumstances of the case, exercised the care of an ordinary prudent man in taking a seat there, with the knowledge of the flagman and without any warning from him. It certainly was not obviously dangerous to do as the plaintiff did so as to leave no room for a difference of opinion as to his negligence in the minds of ordinarily prudent and reasonable men, and, this being so, the question of the exercise by him of due care for his own safety was for the jury. If the principal injury to the plaintiff resulted from a defect in the door, did he have such knowledge of the defect as to charge him with negligence for having exposed himself to a known danger which a man of ordinary prudence would have avoided? Lastly, the jury should have been directed, under proper instructions, to inquire whether or not the plaintiff's negligence, if there was any on his part, was the proximate cause of the injury to him. *Graves v. Railroad*, 136 N. C. 4, 48 S. E. 502; *Brewster v. Elizabeth City*, 137 N. C. 394, 49 S. E. 885. The issue of contributory negligence

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is properly and generally referable, for its determination, to the rule of the prudent man, and cases which reject this as a rule in the law of negligence are not therefore applicable. If no two reasonable minds would differ as to the character of the plaintiff's act, the question of contributory negligence, like that of simple negligence, may become one of law to be decided by the court.

There was evidence from which the jury may have found, under proper direction by the court, that the defendant's negligence was the immediate, efficient, and proximate cause of the plaintiff's injury, and not his own, if he was negligent at all. It was the duty of the defendant to exercise the highest degree of care, prudence, and foresight for the safety of its passengers in the caboose which was reasonably practicable under the circumstances, and, if it failed in this duty, and thereby proximately caused the injury to plaintiff, it is liable, if the plaintiff was not negligent, or, although the plaintiff may also have been negligent, if the defendant's negligence was the real and proximate cause of the injury, and not that of the plaintiff.

In attempting, therefore, to define contributory negligence with special reference to the facts of this case, the court stopped short of a full definition, and, indeed, virtually directed a verdict against the plaintiff upon the third issue, if the jury should find the single fact that by the exercise of ordinary care he could have discovered that the rear end of the car was provided for passengers, and not the front, and for his own comfort and convenience he took a seat in the front compartment. This confined the issue to limits which were too narrow and necessarily prejudiced the plaintiff. For this error a new trial is ordered. The instruction was not only inherently defective in the respect indicated, but the court refused to give instructions requested by the plaintiff's counsel, which, if given, would have cured the defect and presented the case correctly to the jury.

New trial.

KILDUFF *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, May 14, 1907.)

[81 N. E. Rep. 191.]

Carriers—Who Are Passengers.*—Men engaged in constructing railroad tracks were taken to and from the place of work in a special car furnished by the company for the mutual accommodation of the men and the company. The men paid no fare. Held, that the men were not passengers.

Master and Servant—Fellow Servants—Who Are.†—Men engaged in constructing railroad tracks, who are taken to and from the place of work in a special car, are fellow servants of the motorman, relieving the company from liability for injuries sustained in a collision between the car and the wagon.

Exceptions from Superior Court, Suffolk County; Charles U. Bell, Judge.

Action by Luke Kilduff, administrator of Patrick Finneran, deceased, against the Boston Elevated Railway Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

This is an action for damages for an injury to plaintiff's intestate, who was employed by defendant to construct a portion of its railroad tracks. Defendant furnished a car to carry its workmen to and from the place where they worked free of charge. On the day of the accident plaintiff's intestate boarded the car to return home. The motorman allowed the car to run with great speed down a grade to a curve, and it collided with a dump cart. Plaintiff's intestate received fatal injuries in the collision.

S. A. Fuller and L. H. Wardwell, for plaintiff.

Hugh Bancroft and Walter Shuebruk, for defendant.

MORTON, J. Although at the time of the accident the plaintiff's intestate had finished his work for the day, and was under no obligation to do any more work for the defendant on that day, it seems to us plain that he was being transported by the defendant

*For the authorities in this series on the question, who are, and are not, passengers, see foot-note appended to *Malott v. Central Trust Co.* (Ind.), 22 R. R. R. 189, 45 Am. & Eng. R. Cas., N. S., 189; *Chicago Union Traction Co. v. Rosenthal* (Ill.), 21 R. R. R. 747, 44 Am. & Eng. R. Cas., N. S., 747; foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Smallwood v. Baltimore & O. R. Co.* (Pa.), 21 R. R. R. 290, 44 Am. & Eng. R. Cas., N. S., 290; foot-notes appended to *Illinois Cent. R. Co. v. Porter* (Tenn.), 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686.

†As to whether employees while being transported to and from work are fellow servants of trainmen, see foot-notes appended to *Indianapolis, etc., R. Co. v. Foreman* (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214.

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as an incident of his employment and that the relation between him and the defendant was therefore that of master and servant and not that of carrier and passenger. The car was a special car in which only the laborers who were working on that particular job were allowed to ride, and was furnished for the mutual accommodation of the company and the laborers, and plaintiff's intestate paid no fare. The portion of the track where the accident occurred was not open to the public and the transportation over that and the rest of the route was plainly furnished by the defendant to the deceased as a laborer in its employment and not as a passenger. It cannot reasonably be referred to any other relation. *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228; *Seaver v. Boston & Maine R. R.*, 14 Gray (Mass.) 466; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233, 87 Am. Dec. 635; *O'Brien v. B. & A. R. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279; *McQuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454; *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 102, 64 N. E. 726. It follows that the negligence complained of was that of a fellow servant and that the plaintiff is not entitled to recover. The case of *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284, relied on by the defendant is clearly distinguishable from the case at bar and more like *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335.

The conclusion to which we have come on this branch of the case renders it unnecessary to consider the question of the intestate's due care, or the motorman's negligence.

Exceptions overruled.

HOGAN v. BOSTON ELEVATED Ry. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, May 14, 1907.)

[81 N. E. Rep. 198.]

Carriers—Passengers—Injury in Passing from One Car to Another—Carrier's Liability.*—It is not negligence for an elevated railway company to permit passengers to pass from one car to another while the train is at a standstill, nor in such circumstances is it its duty to warn passengers of the existence of a space between the cars.

Exceptions from Superior Court, Suffolk County, J. B. Richardson, Judge.

Action by Emmaline Hogan against the Boston Elevated Rail-

*For the authorities in this series on the subject of negligence in allowing passengers to expose themselves to danger, etc., see foot-notes appended to *Thompson v. Gardner*, etc., Ry. Co. (Mass.), 21 R. R. R. 480, 44 Am. & Eng. R. Cas., N. S., 480; foot-notes appended to *Hawkes v. Boston Elevated Ry. Co.* (Mass.), 21 R. R. R. 286, 44 Am. & Eng. R. Cas., N. S., 286.

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way Company. From a judgment for plaintiff, defendant brings exceptions. Exceptions sustained.

Henry C. Mulligan, for plaintiff.

Hugh Bancroft and *Walter Shuebruk*, for defendant.

MORTON, J. We see no evidence of negligence on the part of the defendant. The court ruled as requested by it that there was no evidence of negligence on its part in the construction of the cars or of the car platforms. We think that it also should have ruled as requested by the defendant that it was not negligence on the part of the defendant to permit passengers to pass from one car to another while the train was at a standstill, and that there was no duty on its part to warn passengers of the existence of a space between the cars under such circumstances. It seems to us that the case is fully covered in all of its aspects by previous cases and that the jury should have been directed to return a verdict for the defendant. *Welsh v. Boston El. Ry. Co.*, 187 Mass. 118, 72 N. E. 500; *Falkins v. Same*, 188 Mass. 153, 74 N. E. 338; *Willworth v. Same*, 188 Mass. 220, 74 N. E. 333; *Field v. Same*, 188 Mass. 222, 74 N. E. 334; *Hilborn v. Boston & Northern St. Ry. Co.*, 191 Mass. 14, 77 N. E. 646; *Hawes v. Boston El. Ry. Co.*, 192 Mass. 324, 78 N. E. 480. There was no such condition of things as existed in *Kuhlen v. Boston & Northern St. Ry. Co.*, 193 Mass. —, 79 N. E. 815, or in *Warren v. Fitchburg R. R. Co.*, 8 Allen, 227, 85 Am. Dec. 700, cases relied on by the plaintiff.

Exceptions sustained.

TEXAS & PAC. RY. CO. v. EDRINGTON.

(Supreme Court of Texas, April 17, 1907.)

[101 S. W. Rep. 441.]

Limitations—Nuisance—Action for Damages.—Where a railroad erected a water tank on its right of way, and such erection and use amounted to a nuisance to the occupant of a neighboring dwelling, limitations did not begin to run against an action by him for damages until the tank was built and operated.

Eminent Domain—Action for Damages—Defenses.*—Const. art. 1, § 17, declares “no person’s property shall * * * be damaged * * * for public use without adequate compensation being made, unless by the consent of such person.” Held, that where a railroad erected on its right of way a water tank, the erection and use of which amounted to a nuisance to the occupant of a neighboring dwelling, in an action by him for damages, reasonable necessity for the location of the tank there was no defense.

Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.

*See extensive note, 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519.

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Action by W. R. Edrington against the Texas & Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. J. Freeman, W. L. Hall, and Spoons, Thompson & Barwise, for appellant.

Robert G. Johnson, for appellee.

BROWN, J. Certified questions from the Court of Civil Appeals of the Second Supreme Judicial District, as follows:

"W. R. Edrington, appellee in the above-styled cause now pending before this court on appeal, instituted suit in the district court of Tarrant county against the Texas & Pacific Railway Company, the appellant, to recover damages under the following circumstances: Appellee alleged that he was the owner of a piece of property near the western limits of the city of Ft. Worth, and about 250 feet from the track of the said railway company, and upon a part of which he had his homestead; that the railway company, after the purchase by him of said property and the erection of his homestead, erected two large water tanks on its right of way, almost immediately south of his residence, and within about the distance above mentioned. His allegations were sufficient to show, and his evidence would have supported a finding, that the erection and use of said water tanks by appellant constituted a nuisance as to him and his said property, entitling him to damages if appellant is not relieved by reason of the following further facts. The pleadings of appellant and the undisputed facts show that it had acquired its right of way where said tanks were situated, and had been operating its railway, more than 20 years prior to the filing of this suit, though the tanks themselves had been constructed only about one month. It also alleged, and its evidence tended to show, that it had built said water tanks in a proper manner and exercised proper care in their use, and, further, that the use of said water tanks was reasonable and necessary for the proper transaction and carrying on of its business.

"The court instructed the jury as follows: 'If you believe from the evidence that the supplying of water to defendant's engines from the water tanks alleged in plaintiff's petition, with the exercise of ordinary care, necessarily produces smoke and noise to such an extent as to cause personal discomfort and annoyance to any persons who should occupy plaintiff's property alleged in his petition to be his home, and that by reason thereof the market value of said property has been depreciated, then you will find for plaintiff damages for such depreciation the measure of which would be the difference, if any, between the reasonable market value of said property immediately before and after the erection and beginning of the use of said tanks for said purposes; and in estimating the market value of said property before the erection of said tanks you will take into consideration any depreciation of said value by the operation of trains and locomotives on the Ft. Worth & Rio Grande Railway and the Texas & Pacific Railway, if you believe that the same did depreciate its value.' Upon this

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charge the verdict of the jury in appellee's favor was necessarily based.

"Appellant requested the following charge, which was refused: 'The jury are instructed that defendant, the Texas & Pacific Railway Company, had the right to construct its water tank at the place same was constructed, provided same was reasonably necessary to the use and operation of its railway, and to put same to a reasonable use. If the jury therefore find that it was reasonably necessary for the use and operation of its railway to erect and use said water tank, and that the defendant, through its agents and servants, in using water from said water tanks, exercised ordinary care with reference to the handling of its engines and the time and manner occupied in taking water from said tanks and in going to and from same, then, under such circumstances, although the jury may find that such use and such circumstances became and was a detriment to plaintiff's property, yet plaintiff is *not* entitled to recover for such damages, and the jury will so find.'

"Appellant has assigned error both to the giving of the court's charge and to the refusal of the requested charge, and we deem it proper, therefore, to certify to your honors for decision the following questions:

"First. Did the court err in giving the charge quoted, thus ignoring the issue of limitation which was properly pleaded by appellant, and assuming that a reasonable necessity for the location of the water tanks at the point where they were located would be no defence to appellee's action?

"Second. If not included in the above, then did the court err in refusing the requested charge submitting the defense of reasonable necessity for the location of the water tanks at the point where they were located?"

To both questions we answer the facts certified did not raise the issue of limitation, and the court did not err in refusing to instruct the jury upon it. The cause of action in this case arose when the water tank was built and was operated, and, of course, there could have been no suit before the injury was inflicted. *Grossman v. Railway Co.*, 92 S. W. 836, 15 Tex. Ct. Rep. 572.

Article 1, § 17, of the Constitution of this state, contains this language: "No person's property shall * * * be damaged * * * for public use without adequate compensation being made, unless by the consent of such person." Under this provision of the Constitution our courts have uniformly held that neither the necessity for the structure nor the manner in which it was used constitute a defense to a claim by the owner for compensation for depreciation in the value of his property. *Railway Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42; *Grossman v. Railway Co.*, cited above; *Rainey v. Railway Co.*, 89 S. W. 768, 13 Tex. Ct. Rep. 993.

The court did not err in refusing to give the charge stated in the question.

CHICAGO, R. I. & P. RY. CO. *v.* ELY.

(Supreme Court of Nebraska, Dec. 21, 1906.)

[110 N. W. Rep. 539.]

Railroads—Construction—Insufficient Culverts.*—Damages are recoverable by a landowner against a railway company for negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. *Chicago, Rock Island & Pacific Ry. Co. v. Andreesen*, 87 N. W. 167, 62 Neb. 456, followed and approved.

Same.—*Gartner v. C., R. I. & P. Ry. Co.* (Neb.), 98 N. W. 1052, and *F., E. & M. V. R. R. Co. v. Gayton*, 93 N. W. 163, 67 Neb. 263, examined and distinguished.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Error to District Court, Sarpy County; Sutton, Judge.

Action by William S. Ely against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

M. A. Low and *Woolworth & McHugh*, for plaintiff in error.
H. Z. Wedgwood, for defendant in error.

OLDHAM, C. This was an action instituted by the plaintiff, as lessee of a farm situated in Sarpy county, Neb., for damages to his growing crops caused by the overflow of a running stream. The grounds of the action were that the defendant railway company negligently constructed its roadbed so that it obstructed the channel of a stream of running water, and that by virtue of this obstruction the waters of the stream were dammed up and caused to flow back and remain on the land where the crops were growing, thereby causing a partial loss of all the crops growing on the leased premises. The answer of the company was in the nature of a general denial and a plea of estoppel by reason of the fact that the defendant company had purchased the right of way across the premises from plaintiff's lessor, who was the owner of the land. On issues thus joined there was a trial to the court and jury, and a verdict and judgment for the plaintiff. To reverse this judgment, defendant brings error to this court.

The only contention urged by the defendant railroad company is that an action for damages for the overflow of the crops cannot be maintained by the lessee of the premises for the reason that the

*See foot-note appended to *Uhl v. Ohio River R. Co.* (W. Va.), 15 R. R. R. 608, 38 Am. & Eng. R. Cas., N. S., 608. See also, extensive note, 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519.

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obstruction is a permanent one, which, unless interfered with by the hand of man, would continue indefinitely, and for this reason all damages, both past and prospective, are recoverable in but one action, which must be instituted by the owner of the freehold. In support of this contention we are cited to the case of *Gartner v. C., R. I. & P. Ry. Co.* (Neb.) 98 N. W. 1052. In this case the question at issue was whether or not a judgment, rendered in favor of the owner of the land for damages to the land occasioned by the construction of a permanent embankment in the building of a railroad, was a bar to a similar action for damages to the land instituted by a subsequent purchaser. It was held that the damages to the land were indivisible, and a judgment therefor was binding on the plaintiff and his privies, but the question of damages to growing crops because of insufficient drainage was not involved in the controversy. The other case relied upon is that of *F., E. & M. V. R. R. Co. v. Gayton*, 67 Neb. 263, 93 N. W. 163, which was an action for damages to growing crops. But in this case the insufficient drainage and borrow pits were all constructed on the lands owned by the railroad company, and afterwards certain of these lands were conveyed to plaintiff's grantor; and the point determined was that the grantee took the lands subject to the visible burdens attached thereto at the time of the purchase. It was held that "where a railroad company constructs its road across its own land, and in so doing erects embankments and bridges and digs ditches and borrow pits, by reason whereof surface water is or may be collected and discharged upon a particular portion of the tract, subsequent grantees of that portion cannot maintain an action against the company by reason of the maintenance of such embankments, bridges, ditches, and borrow pits in their original condition."

It is clear that neither of these cases is applicable to the facts in the case at bar, because this is not an action for injury to the land, but rather for injuries to growing crops, which are admitted to be the property of the plaintiff, who paid a cash rent for the use of the premises; and, again, the crops were not raised on lands which had been purchased by plaintiff's lessor, or any one else, from the railway company, after the construction of the bridge and culvert complained of. We think that the undisputed facts place this case clearly within the rule announced in *C., R. I. & P. Ry. Co. v. Andreesen*, 62 Neb. 456, 87 N. W. 167, in which it was said: "Damages are recoverable by a landowner against a railway company for maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skillful manner." The doctrine here announced was adhered to in the later case of *C., B. & Q. Ry. Co. v. Mitchell* (Neb.) 104 N. W. 1144.

We are therefore of opinion that the trial court was fully justi-

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fied in overruling defendant's request for a peremptory instruction directing a verdict in its favor, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

RAILROAD CO. v. VILLAGE OF ROSEVILLE.

(Supreme Court of Ohio, March 19, 1907.)

[81 N. E. Rep. 178.]

Dedication—Highways—Acceptance.—To show the establishment of a street by a common-law dedication, it is essential to prove clearly that the owner of the land intended to donate it for that use, and to prove also an acceptance.

Same—Evidence.*—An intention by a railroad company to dedicate a street is not clearly shown by proof that a way over its tracks and uninclosed lands had been used for about 40 years by the public, when during the entire time the way was maintained by the company, and was used by its patrons, and the use by the public was merely permissive.

Same—Acceptance.—An acceptance by a city or village of the dedication of a street cannot be shown by proof of user by the public, but it is essential that acts of acceptance by its proper officials be shown.

Municipal Corporations—Establishment of Street—Title by Prescription.—Title by prescription to a public street can be shown only by adverse user by the public, under a claim of right, and uninterrupted for 21 years.

Dedication—Presumptions—Permissive Use.*—When a railroad company maintains a way or street over its tracks and uninclosed land for about 40 years, for the use of its patrons, and incidentally it is used also by the public, the presumption is that the user was permissive.

(Syllabus by the Court.)

Error to Circuit Court, Muskingum County.

Action by a railroad company against the village of Roseville. Judgment for plaintiff was reversed, and it brings error. Reversed.

In 1904 the village of Roseville, of Muskingum and Perry counties, by resolution of its council, ordered the railroad company within 15 days to plank the crossing of its railroad over Armstrong street and to grade and gravel said street across the railroad company's property from said railroad crossing to Perry street, and declared its intention to make the improvement in the

*See foot-note appended to *Larson v. Chicago, etc., Ry. Co.* (S. Dak.), 18 R. R. R. 465, 41 Am. & Eng. R. Cas., N. S., 465.

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event the railroad company failed to do so within 30 days. The railroad company brought suit to enjoin. The village answered, averring that the premises in controversy had become a public street by dedication and also by prescription, and by cross-petition prayed for an injunction to prevent the railroad company from interfering with the use of the street. The common pleas court found for the plaintiff. On appeal the circuit court found for the village and granted the prayer of the cross-petition.

F. A. Durban, for plaintiff in error.

Frank H. Southard, for defendant in error.

SUMMERS, J. (after stating the facts). The record is quite voluminous, and while, owing to the lapse of time, the memory of some of the witnesses is indistinct, yet the following facts appear: In 1854 a railroad company, a predecessor in title of the plaintiff in error, acquired for the right of way a strip of ground, 100 feet in width, west of the then village and west of and nearly parallel with the Athens and Zanesville Road, now called Perry street in said village. Near the north end of this right of way, the road crossed over the right of way to the west, and in 1855 the railroad company, in constructing its road, made a deep cut at the point where the road crossed the right of way, and, a little south of the cut, it constructed a crossing at grade over its tracks, so that travelers on the road could cross its tracks, and then pass north along its right of way until they again reached the road, and the road and crossing were so used for about a year, until the railroad company built a bridge over the cut, which was then used by travelers on the public road. In the deed for the right of way it was provided that the railroad company should construct for the grantor "a crossing place over said railroad track at same place where the elevation of the road is at the same grade as the adjoining land." Whether the grantor made use of this crossing does not appear; but it does appear that the railroad company constructed its track and a side track on this right of way and, east of its track and just north of the crossing, built a station and planked the crossing over the tracks and erected a railroad crossing sign, and that the crossing was used by the public. In November, 1864, land adjoining this right of way on the west was laid out into town lots. It was called "Armstrong's Addition," and several streets in the addition were platted down to the right of way, and one of them, named "Armstrong Street," joined the right of way at the crossing. In December, 1864, the railroad company purchased a small triangular piece of land, lying between its right of way and Perry street. After Armstrong's addition was laid out, some potteries were built there, and also some residences and a church. The railroad company laid additional tracks from time to time, and planked them, and this crossing was used by persons transacting business at the station and as a way to and from Armstrong's addition, and they also crossed over the triangular strip between the crossing and Perry street. In 1890 the station burned down, and

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the railroad company built a new station, on the west side of its tracks and just south of the crossing, and the crossing was used as a way to and from the new station, and continued to be used as before. There is no evidence that the village council ever took any action respecting this crossing or so-called street. One witness testifies that at one time a village street lamp was erected on the line of Armstrong street, a little bit down on the railroad property, but that it was soon after moved back about on the line of the railroad property; and another witness testifies that when he was street commissioner he did a little work on this so-called street, but it does not appear that the railroad company ever had any knowledge of it. This use of the crossing continued until 1901, when the railroad company moved its station to the east of the tracks and north of the location of its first station, and then tore up the planking and destroyed the crossing.

It is well settled that, in order to deprive the owner of his property by a common-law dedication, it must clearly appear not only that he intended to and did give it to the public, but also that the gift was accepted. That the railroad company intended to dedicate this so-called street or a way over its tracks and ground to the public does not clearly appear. Originally the crossing was constructed in performance of the engagement in the deed or to accommodate the traffic intercepted by the cut through the road, or for both purposes, and, after the bridge had been constructed, it is just as probable that the crossing was maintained solely for the accommodation of the patrons of the road as for the public. No estoppel, so far as the village is concerned, arises from the laying out of the Armstrong addition. The addition was not then in the village, and the railroad company did not then own the triangular piece of land between the right of way and the road, and the fact that Armstrong street was laid out adjoining the crossing is not significant, for two streets parallel to Armstrong street were comprised in the addition, and on the plat of the addition neither of the streets is delineated as extending beyond its boundaries.

Furthermore, an acceptance on the part of the village is not shown. It is said that the late cases rule that an acceptance may be implied from public user, upon the assumption that the inhabitants are the principal and the corporate officials merely its agents, and that the principal may himself do what he might have done through the intervention of an agent. Elliott on Roads and Streets (2d Ed.), § 150. A somewhat similar suggestion was made in the time of King James I. The usurpation of the court of high commission being checked, much to the disappointment of the king, by prohibition from the court of common pleas, it was suggested that the king in his own person should judge whatever cases he pleased, free from all risk of prohibition or appeal. The reasoning, as given by Lord Campbell, was as follows: "The judges are but the delegates of your majesty, and administer the law in your name. What may be done by the agent may be done by the principal. Therefore your majesty may take what causes

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he may be pleased to determine from the determination of the judges, and determine them yourself." But the king was advised by Coke, C. J., all the judges concurring, that the king in his own person could not adjudge any cases either civil or criminal. Prohibitions, Del Roy, 12 Coke's R. 63. In this state, however, local subdivisions, such as counties and towns, are themselves merely agencies of the state, possessing only delegated powers, and the prescribed mode or manner of exercising them is the measure of the power. They can act only by their officers, and the duty to care for the roads and streets and the liability for damages for neglecting to perform the duty cannot be imposed upon them by proof of user by the public, but only by an acceptance by the authorities whose duty it would be to care for the road or the street if it should be established. But roads and streets may be established by prescription (Elliott on Roads and Streets [2d Ed.] § 169), and if the foundation of the right is as stated by Chief Justice Shaw, in *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662, neither an intention to dedicate nor an acceptance of the dedication is an element. He says: "We think it clear, upon principle, that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment that they were, at some anterior period, laid out and established by competent authority." Does the evidence tend to prove a right by prescription? In *City of Topeka v. Cowee*, 48 Kan. 345, 29 Pac. 560, it is held that "user, to create a title by prescription to a public street, must be under a claim of right by the public, adverse to the right of the owner, and continued without substantial interruption or change for a period equal to the statutory limitation in respect to actions for the recovery of real estate." This is the well-established rule. Elliott, § 175. In *Pavey v. Vance et al.*, 56 Ohio St. 162, 46 N. E. 898, it is ruled that, "where one uses a way over the land of another without permission as a way incident to his own land, and continues to do so with the knowledge of the owner, such use is of itself adverse, and evidence of a claim of right; and, where the owner of the servient estate claims that the use was permissive, he has the burthen of showing it." However, it is pointed out by Michell, J., in the opinion, that a claim of right is not consistent with a case where the possession is taken or held under a license or permission of the real owner.

This crossing was constructed for the accommodation of the grantor of the right of way, or of travelers on the public road whose passage had been interrupted by the excavation, or for both, and its use by them was by the implied invitation of the railroad company. Subsequently it was to its interest to maintain it for the accommodation of its patrons, and no other reason for its maintaining it is apparent, and a presumption that the use was adverse does not arise from the fact that incidentally to this use, by those having an implied invitation, it was used also by the public. *Root v. Commonwealth*, 98 Pa. 170, 42 Am. Rep. 614;

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Loeres v. Strauer, 1 Cin. Super. Ct. Rep'r, 57, in which leave to file a petition in error in this court was refused; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 Am. Dec. 754; *Smith v. N. Y. & N. E. R. R. Co.*, 142 Mass. 21, 6 N. E. 842; *Irwin v. Dixon*, 9 How. (U. S.) 10, 13 L. Ed. 25.

The judgment is reversed, the injunction is dissolved, the cross-petition is dismissed, and the cause is remanded to the circuit court, with instructions to grant the prayer of the plaintiff's petition upon the undisputed facts.

Judgment reversed.

SHAUCK, C. J., and PRICE, CREW, SPEAR, and DAVIS, JJ., concur.

CITY OF CHESTER v. BALTIMORE & O. R. Co. *et al.*

(Supreme Court of Pennsylvania, April 1, 1907.)

[66 Atl. Rep. 654.]

Railroads—Use of City Streets.*—A railroad company has no power to enter upon, occupy, or cross the streets of a municipality without its consent.

Same—Alteration of Tracks in City.—A railroad company, under Act May 31, 1887 (P. L. 275), cannot elevate or depress its tracks within the limits of a city without the consent of said city.

Appeal from Court of Common Pleas, Delaware County.

Action by the city of Chester against the Baltimore & Ohio Railroad Company and the Baltimore and Philadelphia Railroad Company. From a decree granting a preliminary injunction, defendants appeal. Affirmed.

The following is the opinion of Johnson, P. J., in the court below: "The plaintiff is a city of the third class. The defendant is a railroad company. Its line runs through the city of Chester, crossing the streets at grade, except Ridley. Among them are Potter, Walnut, Chestnut, Fourteenth street, and Melrose avenue. Potter is an opened and paved street. Walnut is an opened and paved street. Chestnut is an opened street not paved. Ridley is not an opened street. Fourteenth street is an opened and paved street. Melrose avenue is an opened street not paved. The defendant, in pursuance of a general plan, began the elevation of its tracks at the crossings of the above named streets, on some of them

*For the authorities in this series on the question whether a steam railroad company has the power to occupy or cross with its tracks the streets of a municipality without its consent, see *Edwards v. Pittsburg Junction R. Co.* (Pa.), 21 R. R. R. 328, 44 Am. & Eng. R. Cas., N. S., 328 (railroad was without authority to occupy or use street after breaking condition upon which city consented to its use of street); *Collier v. Union Ry. Co.* (Tenn.), 17 R. R. R. 426, 40 Am. & Eng. R. Cas., N. S., 426 (consent of city must be obtained, and route defined).

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above the official grade, and on some above the existing physical grade, and in such way as necessitated a change in all the street grades, except Ridley, from a few inches to three or four feet, respectively. To prevent this the city filed the present bill. A preliminary injunction was granted restraining the defendant from elevating its tracks at all the above-named streets, except Ridley. The court entered a decree continuing the preliminary injunction."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

W. B. Broomall, for appellants.

A. A. Cochran, for appellee.

POTTER, J. The appellant here complains of the court below that it has, by means of a preliminary injunction, prevented the defendant company from elevating its tracks at the crossings of several streets without the consent of the municipal authorities of the city of Chester. The action of the court below in this matter was fully justified by the principles laid down in *Pittsburg v. Pittsburg, etc., Railroad Company*, 205 Pa. 13, 54 Atl. 468, holding that in this commonwealth a railroad company has no power to enter upon, occupy, or cross the streets of a municipality without the consent of the municipality. If a railroad cannot be originally constructed upon or across a city street without municipal consent, it necessarily follows that, after it has once been constructed, in a form and manner approved by the municipal authorities, before any material change can be made in the construction of the road, the municipal consent must be obtained for the desired change.

An elevation of the grade would certainly be a material change. The conclusion that municipal consent must be obtained before making any such change is not only reasonable in itself, but it has legislative sanction. The act of May 31, 1887 (P. L. 275), provides that railroad companies whose route extends through or into any city of this commonwealth may elevate or depress their tracks within the limits of such city, provided that the consent of said city, through councils, to such elevation or depression, be first had or obtained. There is no merit in the contention of appellant.

The assignment of error is overruled, and this appeal is dismissed, at the cost of appellant.

PULLMAN CO. *v.* PENNOCK.

(Supreme Court of Tennessee, April 27, 1907.)

[102 S. W. Rep. 73.]

Carriers—Breach of Contract—Damages—Excessiveness.—Plaintiff sued a sleeping car company for refusing him accommodations in one of its cars, because of a mistake made by defendant's agent in selling plaintiff a ticket and his inability to again pay for a berth. Plaintiff was compelled to sit up all night in a crowded day coach, but there was neither averment nor proof that he was treated with rudeness or discourtesy, or subjected to unnecessary humiliation. Held that a verdict allowing plaintiff \$500 was excessive.

Trial—Misconduct of Counsel—Argument.*—In an action against a sleeping car company for refusal to furnish plaintiff accommodations, plaintiff's counsel in argument said that it was for the jury to assess the damage; that defendant was a vast and wealthy corporation, and made for itself a vast income; that in a case almost identical with the one in controversy a verdict of \$10,000 had been given and sustained. An objection was sustained, and the jury admonished; but counsel returned to the subject and again referred to the case in which a verdict of \$10,000 had been awarded. An objection was again sustained, and counsel was reprimanded, when he proceeded to read from the report of the case and was interrupted, reprimanded, and fined. Held that, an excessive verdict having been rendered, the court's rulings did not cure the misconduct, which was prejudicial to defendant.

Appeal from Circuit Court, Shelby County; J. P. Young, Judge.

Action by E. M. Pennock against the Pullman Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. H. Jackson and Marion G. Evans, for appellant.

Heber Williams and P. M. D. Dowdall, for defendant.

SHIELDS, J. This action was brought by E. W. Pennock against the Pullman Company to recover damages for the wrongful conduct of the employees of the company in refusing him accommodations in one of its cars from St. Louis, Mo., to Memphis, Tenn., because of a mistake made by an agent of the company in St. Louis in selling the plaintiff a ticket and his inability to again pay for a berth. Plaintiff was compelled to sit up all night in a crowded and uncomfortable day coach, but there is no averment or proof that he was treated with rudeness or discourtesy, or subjected to unnecessary humiliation. There was, on a trial before

*For the authorities in this series on the subject of arguments and remarks of counsel, reflecting on the credibility of witnesses, etc., see foot-notes appended to *Eppstein v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 295, 45 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

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a jury, a verdict and judgment in favor of the plaintiff for \$500, and the company has brought the case to this court for review, and assigns several errors. The only assignment of error that we will consider is one predicated upon the misconduct of counsel for the plaintiff below in the argument of the case, which was as follows:

In his closing argument counsel said:

"Gentlemen, it is for you to say how much damage you will assess against this defendant. The Pullman Company is a vast and wealthy corporation, which enjoys large and valuable privileges given it by the people of Missouri, Kentucky, Tennessee, and other states. It enjoys these privileges and makes for itself a vast income. The public are absolutely at its mercy. There is a case almost identical with this where a man was put out of a car, and the jury gave a verdict of \$10,000, and the Supreme Court of the state on appeal sustained the verdict."

Counsel for the company interposed an objection to this character of argument, which the court sustained, announcing that the argument was improper and should not be considered by the jury.

Counsel for the plaintiff, continuing his address, in the course of a few minutes returned to the same subject and said:

"Now, gentlemen, the question of the amount of damages is solely for you. There is not a man on this jury but believes that the plaintiff was unnecessarily and willfully put to great discomfort and hardship and made to undergo great humiliation, shame, and disgrace. The jury in the case I have referred to, which was very similar to this one, gave a man a verdict of \$10,000 for being wrongfully put off a car, and the Supreme Court refused to say that this verdict was unreasonable or excessive."

Counsel for the defendant renewed his objection, and it was again sustained; the court saying to counsel that his argument was highly improper and in disregard of its ruling. Counsel for the plaintiff then stated that, if this oral argument was considered improper, he would read from the report of the case, which set out the facts, and proceeded to do so, repeating his former statements to the jury. He was then interrupted by the trial judge and reprimanded for deliberately disregarding the rulings of the court, and a fine of \$25 imposed upon him for his misconduct. This misconduct was assigned as a ground for a new trial, and the action of the court in failing to favorably consider it is, as above stated, now assigned as error in this court.

This conduct of counsel for the plaintiff was highly improper, and calculated to excite and inflame the jury and cause it to find an excessive verdict upon an improper basis, and was therefore prejudicial to the defendant. There was no evidence in the record concerning the wealth of the defendant company, the privileges it enjoyed, or the income it received. The record in the case to which counsel referred, in which a judgment for \$10,000 had been recovered, was not in evidence in this case, and the facts in that case were unknown and foreign to the issues being tried. It has frequently been held by this court that counsel cannot in

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argument make statements of facts which no evidence has been offered to prove for the purpose of influencing the jury, and that opinions of courts in other cases stating the amounts of recoveries there had cannot be read for a like purpose, and that where these things are done over the objection of counsel for the opposite party they will vitiate a verdict thus in part procured, and it will be set aside and a new trial granted. *Manufacturing Company v. Woodall*, 115 Tenn. 605, 90 S. W. 623; *Thompson on Trials*, vol. 1, §§ 947, 963; *English v. Ricks*, 117 Tenn. —, 95 S. W. 189.

It is immaterial that the objection to the improper matter was sustained, and that counsel was reprimanded and fined. The purpose of counsel had been accomplished. The jury had been inoculated with the poison of the foreign matter improperly injected in the case, and every lawyer of experience knows the impossibility of removing the impression that has been made. It cannot be done. No verdict should be allowed to stand where counsel deliberately and persistently inject into the record matter calculated to prejudice the jury against the opposite party and influence the jurors in their deliberations. Tampering with juries in or out of court in any form cannot be tolerated. It corrupts the very fountains of justice and renders a trial worse than a farce. The client is responsible for the action of his attorney, and cannot be allowed to reap a benefit improperly obtained by him. The conduct of counsel in this case could not have been intended for any other purpose than to cause the jury to render an excessive verdict; and it is evident, considering the size of that found and the injuries sustained by the plaintiff, that his efforts were successful.

This assignment of error is sustained, the judgment of the trial court reversed, and the case remanded for a new trial.

GREENWOOD v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, April 24, 1907.)

[57 S. E. Rep. 157.]

Waters and Water Courses—Surface Waters—Duty of Lower Proprietor.*—Plaintiff owned land on the north and south sides of defendant's railroad, and the surface water flowed from the land on the north towards the track, and, side ditches there being filled up with dirt coming down with the water, water overflowed the track and ponded on and injured his land to the south. Held, that plaintiff had no cause of action because of defendant's failure to keep open the side ditches to divert and carry off the water coming from the higher land.

*See foot-notes appended to *San Antonio, etc., Ry. Co. v. Kiersly* (Tex.), 16 R. R. R. 10, 39 Am. & Eng. R. Cas., N. S., 10; *Uhl v. Ohio River R. Co.* (W. Va.), 15 R. R. R. 608, 38 Am. & Eng. R. Cas., N. S., 608.

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Appeal from Superior Court, Surry County; Ward, Judge.

Action by J. H. Greenwood against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

Action for damages to the bottom lands of the plaintiff by water overflowing the track of the defendant and ponding thereon. The allegations of negligence are that the defendant had negligently permitted and allowed the ditch on its right of way on the north side of the track, where it passed over the plaintiff's land, to remain filled up and unopened, and, as the ditch was necessary to divert and carry off the water flowing onto the right of way, that by reason of the ditch being so filled up, and remaining unopened, water overflowed the track and ponded itself on his bottom lands on the south side of the track, cutting washes in the land, and leaving a deposit on the land of sand, gravel, and other substances injurious to the soil. There is no allegation that the embankment caused the water to be obstructed in its flow, and therefore pond back on his upland. The hill land lying to the north consists of some 6 or 7 acres that drained into a ravine, ending some 75 feet from the track, and the water that had collected in this ravine from the 6 or 7 acres, both cultivated and uncultivated, after following the course of the ravine to its end, then flowed into a ditch or gulley, which began at the end of the ravine and continued towards the track, and emptied all the water so collected on the right of way, about half way between the outer edge of the right of way and the side ditch. At a point opposite where the water was so emptied onto the right of way the land was practically level, and formed a watershed, and it was at this point that the water would flow over the track onto plaintiff's bottom lands to the south. Beginning at this point, the defendant had cut side ditches, one to the east and one to the west. As originally cut, and when opened, the ditch began at a depth of about 12 inches, and as it continued along the side of the track got deeper and deeper, until, at the point where it emptied into a natural water channel, it was some 5 or 6 feet in depth. The evidence disclosed that this side ditch would be filled up with dirt, trash, etc., coming down from plaintiff's land through the ravine and ditch, and, when so filled up, would remain in that condition for periods of time, long and short. The side ditch was properly and carefully constructed, and, when not filled up by the dirt and trash from plaintiff's land above, provided ample drainage for the right of way, but was not sufficient, even when not filled up, to carry off all the water that came down through the ravine in hard rains. Practically all the water that flowed into this side ditch, or onto plaintiff's land south of the road, came from his lands above. There was testimony to the effect that, to cut a ditch sufficient to carry off all the water that came upon the right of way, it would have to be begun so deep at its beginning that when it reached its output it would be so deep as to seriously impair the usefulness and safety of the road-bed. It was also in evidence that a ditch could not be made that would not fill up with dirt and trash brought down from the

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land above during a hard rain. There was also evidence tending to show that the plaintiff could, at a reasonable cost, cut a ditch on the south side of the track, and thus prevent the water that broke over the track from sobbing his bottom land. There was a verdict for the plaintiff. Exception and appeal by the defendant.

Manly & Hendren, for appellant.

J. F. Hendren and *W. L. Reece*, for appellee.

CLARK, C. J. (after stating the case). The exceptions are to the charge only. His honor erred in instructing the jury that "the defendant owed to the plaintiff the duty to provide side ditches sufficient to collect and carry off all surface water that came down from the land above in its natural flow" and was responsible for any damages the plaintiff sustained by reason of the defendant's ditches being insufficient to carry off the water coming down from above in its natural flow, and refused to charge, as requested, that it did not owe such duty to the plaintiff. It is settled that the lower proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. The owner of the upper land may accelerate the flow of the water, but cannot divert it. *Porter v. Durham*, 74 N. C. 767. This is true as between the defendant and the plaintiff as owner of the land above the railroad track, and it is equally true as between the defendant and the plaintiff as the owner of the land below the railroad. The defendant, had it so chosen, might by its side ditches have caught the water coming down from the plaintiff's land above its track and led it to be discharged at another point, if the owner of the land at such point did not object. But there is no allegation or proof that the defendant has obstructed or diverted the natural flow of the water coming from above and poured onto the plaintiff's land. The plaintiff has no legal ground for his complaint, which is that the defendant has not kept open side ditches to divert and carry off the water coming down from above, but, permitting the ditches to fill up, has let the water from the plaintiff's land above sweep across its track unimpeded and flow in its natural course upon the plaintiff's land below.

Error.

NORTHERN CENT. RY. CO. v. UNITED RYS. & ELECTRIC CO.

(Court of Appeals of Maryland, April 3, 1907.)

[66 Atl. Rep. 444.]

Street Railroads—Duty to Pave Streets—Bridges.—A railroad company entering a city and crossing a street at grade, an ordinance was passed providing that the grade of the street be raised so as to enable the railroad company to construct its railroad tracks under the street, and the change of grade, made in pursuance of the ordinance, was accomplished by the construction of a bridge. By a previous ordinance of the city a street railway company was granted the right to lay double tracks upon this street on the condition that the owners thereof should keep the portion of the street covered by its tracks and two feet on either side thereof in repair. With respect to a second street of the city, another street railway company was by ordinance authorized to construct double tracks upon the same, on the same condition as to repair as that imposed in the first grant of authority. A bridge connecting portions of that street and forming the only means of passage from one portion to another, had at that time been constructed by the city. Neither the charters of these two street railway companies nor the ordinances of the city made any reference to bridges as distinguished from streets, and under the respective grants of authority to use such streets the two street railway companies laid their tracks upon these two bridges. Held, that the two bridges were parts, respectively, of the two streets, within the meaning of the word "streets" as used in the ordinances imposing on the owners of the street railways, as a condition of their right to use the streets, the duty to repair the same.

Subrogation—Benefit of Original Obligation.—Where street railway companies were under obligation to the city to keep in repair the portion of two bridges occupied by their tracks and two feet on either side, and thereafter a railroad company became liable to the city to maintain and make all needed repairs on both bridges by virtue of ordinances granting certain privileges, the obligation of the street railway companies was not thereby discharged, and the railroad company, having made all such needed repairs, was entitled to recover from the street railway company succeeding to the rights and obligations of the original companies that portion of the cost of repairing the bridges for which the street railway company would have been liable had the bridges been repaired by the city.

Appeal from Superior Court of Baltimore City; Ch. E. Phelps, Judge.

Action by the Northern Central Railway Company against the United Railways & Electric Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial awarded.

Argued before BRISCOE, BOYD, PEARCE, SCHMUCKER, BURKE, and ROGERS, JJ.

Northern Cent. Ry. Co. v. United Rys. & Elec. Co

Shirley Carter and John J. Donaldson, for appellant.*Fielder C. Slengluff*, for appellee

PEARCE, J. This action was brought by the Northern Railway Company to recover from the United Railways & Electric Company of Baltimore the sum of \$2,099.89, claimed to be due and owing as its proportion of the cost of repairs to two bridges known as the "Charles Street Bridge" and "Maryland Avenue Bridge," which respectively, form a continuation of Charles street and of Maryland avenue, two of the public streets of Baltimore City, running parallel to each other. Both of these bridges cross the valley below, in which flows the stream known as "Jones Falls," and on the banks of which beneath said bridges are located the tracks of the Northern Central Railway. To avoid the repetition of long names, we shall in this opinion refer to the Northern Central Railway Company as the "railroad company," to the United Railways & Electric Company as the "railway company," and to the mayor and city council of Baltimore as "the city." The declaration, as filed, contained six counts; the first four being the common counts for money payable by defendant to plaintiff, and the fifth and sixth counts being special counts, which we shall request the reporter to have transcribed in connection with this opinion. The defendant pleaded the general issue, never promised as alleged, and demurred to the fifth and sixth counts, and the demurrer to each of these counts was sustained with leave to amend. The plaintiff declined to amend these counts, but by leave of the court amended the declaration by striking out the four common counts, whereupon judgment was entered on the demurrer for defendant, and plaintiff appealed. Before the ruling on the demurrer an agreement was filed that all ordinances of the city in any way relating to the subject-matter of the suit should be considered as a part of the declaration in the case as fully as if the same had been set out at length therein. It will be seen by reference to the fifth count of the declaration that it is there sought to recover upon the strength of the obligation alleged to be imposed, by the condition in the grant of the city, upon the defendant as successor to the rights and obligations of the Baltimore City Passenger Railway Company, and of the Baltimore Traction Company, the cost of repairs between the tracks on these two bridges, and two feet upon either side thereof, upon the legal theory that these bridges are parts of the respective streets; and it will appear by reference to the sixth count that it proceeds upon the defendant's theory that these bridges are not parts of these streets respectively, and upon the further legal theory that, if they are not parts of said streets, then they are private property of the plaintiff, and that the defendant cannot occupy or use that property without making compensation for the increased cost imposed upon the plaintiff as owner, by such use and occupation.

Three questions were raised at the argument: (1) Are these bridges parts, respectively, of Charles street and Maryland avenue, within the meaning of the ordinances of the city relating to

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the laying of street railways thereon? (2) If so, is the plaintiff entitled to maintain this action upon the obligation alleged to be imposed by the condition in the said ordinances upon the defendant as successor to the rights and obligations of the original grantees? (3) If these bridges are not parts of these streets, respectively, and therefore not within the scope of the supposed obligation, can the plaintiff recover in this suit the increased expense to which it is put by the use of its property by the defendant?

In order to a proper understanding of the legal effect of the averments of the declaration, it will be necessary to state the substance of some of the city ordinances which it was argued should be considered as set out in the declaration, and also something of the physical situation at the location of these bridges before the passage of any of these ordinances. Previous to the year 1868 the railroad company, after entering what were then the northern limits of the city, went upon the west side of Jones Falls, down and across certain streets to its station on Calvert street, in Baltimore City. About the year 1868 its tracks under proper legal authority, after entering the northern limits of the city, were changed to the northerly or eastern side of Jones Falls, and, in going to Calvert Station, crossed Charles and Eager streets at grade; Maryland avenue. North and Calvert streets not being opened as streets at that time beyond Jones Falls. In the year 1868 the property owners on Charles and Eager streets petitioned the city to raise the grade of Charles and Eager streets in order to cross the railroad above grade. This resulted in the passage of Ordinance No. 77 of 1868. The first section of this ordinance provided "that the grade of Charles street, between Hoffman and Lanvale streets, and of Eager street, between North and Buren streets shall be raised by the mayor and city commissioner so as to enable the said Railroad Co. to construct its railway tracks under said streets." It must be noted here that Charles and Eager streets were then both graded and paved, and were in use as streets, and it was therefore provided by section 2 of that ordinance "that all expenses incurred in making said change of grade shall be paid by the Northern Central Railway Co." This necessarily included the cost of maintenance of said bridges by which alone this change of grade was accomplished. It seems to be entirely just and equitable that the railroad company should bear the cost and expense of taking up the pavements already laid, and cutting through them in changing the route of the railroad for its convenience in the accommodation of the public. From this ordinance of 1868 it will thus be seen that the railroad company was obligated to the city to keep in repair the whole bridge forming the northerly extension of Charles street. By Ordinance No. 44 of the year 1859, the Baltimore City Passenger Railway Company was granted the right to "lay double tracks upon Charles street from the northern limits of the city to Read street, thence along Read street to Calvert street," etc. But, as a condition of said grant, section 11 of said ordinance provided "that the owners and proprietors of said railways shall keep the streets covered by said tracks, and extend-

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ing two feet on the outer limits of either side of said tracks, in thorough repair, at their own expense, and shall free the same from snow and other obstructions, in doing which they shall not cause to be obstructed the other portions of the street on either side of the railway tracks authorized by this ordinance to be constructed, and for non-compliance the mayor and city council may impose such reasonable fines not exceeding twenty dollars per square, to be collected as other city fines are now collected." So much for the bridge over Charles street, and we now come to the bridge over Maryland avenue.

Maryland avenue was not opened as a public street across the valley of Jones Falls until some time after 1877. In the meantime, in March, 1877, the case of the Northern Central Railway Co. v. Baltimore, 46 Md. 425, was decided, in which it was held that the city must pay for the bridges necessary to carry North and Calvert streets across the valley of Jones Falls, when those streets were opened across said valley, and, as the result of that decision, the bridges now continuing said streets were constructed. Subsequently Maryland avenue was opened across said valley, and the city accordingly built the bridge necessary for that purpose, and paid both the cost of its construction and maintenance up to the year 1882. Then Ordinance No. 40 of 1882 was passed, as a supplement to Ordinance No. 150 of 1880 (which related to the Baltimore Union Passenger Railway Company), and by said Ordinance No. 40 of 1882 the Baltimore Union Passenger Railway Company, to all whose rights and obligations the railway company in this case has succeeded, was granted the right "to lay down and construct double tracks upon Biddle street, from the intersection of said Railway Co.'s tracks upon Park avenue to Maryland avenue, and like double tracks upon Maryland avenue from Biddle street to the northern limits of the city," the latter authority embracing that part of Maryland avenue supplied by the said bridge, and said ordinance further provided "that said tracks should be constructed, used and operated under the terms and conditions mentioned in ordinance No. 150 of 1880." The terms and conditions mentioned in that ordinance are stated therein in the exact language of Ordinance No. 44 of 1859, which, so far as it relates to the repair of said tracks, has been transcribed in full in the preceding part of this statement of the facts. When Maryland avenue was opened and the bridge carrying it across the valley was constructed by the city, the railroad company had but two or three tracks crossing the line of the street under said bridge. The street, when graded so as to conform to said bridge, was carried on a fill or bank both to the north and south end of the bridge, obstructing the railroad company's property beneath these fills, and preventing the laying of additional continuous tracks on the property of the railroad company. Finding it necessary, however, to have these additional tracks, the city and the railroad company entered into an arrangement for the removal of both said fills or banks and the extension of the bridge both north and south. This was for the convenience of the railroad

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company, and the city granted it the right to make those changes in Ordinance No. 132 of 1890, entitled "An ordinance to authorize the Northern Central Railway Company to move the north abutment of the bridge which carries Maryland avenue over its tracks, and also to extend said bridge southward to the bridge over Jones Falls"; and this ordinance provided "that all the work authorized by this ordinance shall be done under the supervision and to the satisfaction of the city commissioner, and at the sole cost and charge of said Railway Co.," and "that the bridge over the tracks of the Railway Co. as well that now existing, as the extension thereof hereby authorized, shall always be maintained at the sole cost of the Northern Central Railway Co." It thus appears that the railroad company is under legal obligation to the city to maintain both said bridges in repair, by virtue of the ordinances granting it, for its own convenience, rights, and privileges in the streets extended by means of said bridges, and that the railway company is under legal obligation to the city to keep in repair that portion of the beds of Charles street and Maryland avenue occupied by their tracks, and two feet on either side thereof, by virtue of the condition in the ordinances granting them authority to lay said tracks in the beds of said streets; and, if said bridges are parts of said streets, it also appears that this liability of the railway company to the city applies as well to said bridges as to any other parts of said streets. Upon that hypothesis, therefore, both the railroad company and the railway company are liable to the city for the repair of said bridges, the former to the extent of all the necessary repair, and the latter to the limited extent provided in the grant of authority to lay its said tracks.

The demurrer admits the averments of the declaration in both counts; that the defendant recognized its liability ever since the passage of said ordinances, down to the month of March, 1903, and "provided for the repairs needed to the flooring of said bridges, between the tracks, and extending two feet on the out limits on either side of said track, either by furnishing the material and labor therefor, or by paying the plaintiff for the work and materials by it furnished for the same," but that since March, 1903, the defendant has refused further to recognize any liability in the premises, and has refused to pay for its proportion of the repairs then made by the plaintiff as set forth. The first question for determination is whether these bridges are streets, or parts of streets, within the meaning of the word "streets," as that word is used in the ordinances imposing the obligation upon the owners and proprietors of the railways in question to keep in repair "the streets covered by said tracks, and two feet on the out limit of either side of said tracks." It is not necessary to maintain that a bridge connecting portions of a city street, and forming the only means of passage from one portion to another, is for all purposes, and under all circumstances, a part of said street. Our inquiry here is whether these bridges for the purpose of this case are parts of these particular streets. It will be observed at the outset of this inquiry that, under a grant from the city to the

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railway company of the right to lay its tracks in the streets of the city, the railway company has laid its tracks on these bridges connecting portions of said streets, and that neither the city nor the railroad company has ever denied or questioned their right to do so under that grant. The grant would have been of no practical value to the grantee if it had been obliged to terminate its tracks at each end of these bridges, and the railway would have been of no practical value to the traveling public as a means of conveyance nor to the city as a source of revenue for the Park tax imposed upon the street railways. To exclude, therefore, the right to use these bridges, would be to nullify the practical advantages to the public and to both of the direct parties to the contract. But, if the right so to use the bridges is a part of the contract, then it must be subject to the condition upon which the right is granted. In *North Baltimore Passenger Railway Co. v. North Avenue Railway Co.*, 75 Md. 243, 23 Atl. 469, Judge Alvey has said: "Where a contract with a municipality is susceptible of two meanings, one restricting, the other extending, powers of the other party, that is to be adopted which works least harm to the municipality. In other words, where is a want of plainly expressed intention, the construction should be beneficial to the public." And that language was used in construing a grant made by the city to a street railway company for the use of its streets. In the case before us every beneficial interest of the municipality requires the words "streets" to include these "bridges," and the beneficial interest of the railway company demands the same construction. If we now place ourselves in the situation of the parties to this grant, as we have a right to do, and should do, in order to avail ourselves of the light of the surrounding circumstances, and the conduct of the parties at the time, it will be seen that the parties themselves have left no doubt of their construction of the grant. We have examined the charter of the Baltimore City Passenger Company (Acts 1862, c. 71) and the charter of the Baltimore Union Passenger Company (Acts 1882, c. 47), and neither of these corporations were by their charters granted any authority to construct or build bridges or to lay their tracks upon any bridges or in any streets in Baltimore City, except as granted by said city. Their only right, either under their charters or the ordinances passed in their behalf, is to lay their tracks in streets designated as such, and they have no authority from any source to lay their tracks on bridges as distinguished from streets in Baltimore City. The city itself has been delegated by the state no power to build bridges as distinguished from streets, and it has always built such under its general powers to open and extend streets, and has done this through its street commissioners or officers charged with that duty. The North Street and Calvert Street Bridges were so constructed, and in *Northern Central Railway Co. v. Mayor & City Council*, 46 Md. 445, where the proceedings in reference thereto were under review, the court, after considering the difficulties of crossing the railroad tracks either at grade, which would be dangerous to the public, or by fills which

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would destroy parts of the tracks of the railroad company, said: "The only mode in which the proposed streets can cross the tracks, without great injury both to the appellant and the appellee, is by viaducts or raised ways of some description." Since neither the charters of these companies nor the ordinances of the city made any reference to bridges as distinguished from streets, and as said companies laid their tracks upon said bridges without other authority, and the city assented thereto, and as said companies ever since down to 1903 and 1904, complied with the condition annexed to the grant of the use of the streets, by keeping in repair the same proportion of trackage upon these bridges as upon these streets, it would be idle to deny that they regarded these bridges as parts of said streets, and that their present attitude is a departure from that which they have maintained for many years.

In *North Baltimore Passenger Railway Co. v. Baltimore*, 75 Md. 247, 23 Atl. 470, the appellant had been granted by an ordinance the right to "lay its tracks on, and use North avenue from McMechen to Charles street," which included North Avenue Bridge, and under that grant had laid its tracks on North Avenue Bridge. It then sought to restrain the city from giving another railway company the right to lay its tracks on North Avenue Bridge, and the court held that it was only "so much of the street as may be actually occupied that can be claimed to be exclusive of other tracks, and other parts of the street may be granted to competing lines." Here, then, is a plain implication that a grant to use the street is a grant to use a bridge forming the only connection between parts of that street. But that case does not stop with that implication. It states in explicit language that the bridge known as 'North Avenue Bridge' over Jones Falls is the property of Baltimore City, erected and maintained for public use, and forms a part of North avenue, one of the highways of the city." The fact that North Avenue Bridge was the property of Baltimore City is not material to the question in hand. The city had wisely relieved itself of the burden of maintaining Charles Street and Maryland Avenue Bridges when it granted the railroad company privileges for its own convenience under said bridges, but they were none the less highways of the city, as North Avenue Bridge was declared to be, and the city could no more forbid public travel across these bridges than it could across North Avenue Bridge, merely because it had imposed upon the railroad company and upon the railway company, as a condition of the right of the latter to lay its tracks thereon, the obligation to repair these bridges so as to keep them in safe condition as public highways. An emphatic and significant instance in connection with Charles Street Bridge and with Eager Street Bridge is found in the language of Ordinance No. 77 of 1868, which provided "that the grade of Charles street between Hoffman and Lanvale, and the grade of Eager street between North and Buren streets, be raised and changed under the direction of the mayor and city commissioner so as to enable the Northern Central Railway, to construct its railway tracks under said streets." This ordinance

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is not so suggestive of deliberation and design in describing the tracks as laid under the streets, as it is of common sense and natural adherence to language appropriate to the work the city was specifically authorized to undertake, viz., the opening and extending of streets whether at, above, or below grade.

The weight of authority in well-considered cases sustains the view expressed in *North Baltimore Passenger Railway Co. v. Baltimore*, 75 Md. 247, 23 Atl. 470. In *Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418, plaintiff's intestate stepped off one end of an unlighted-draw bridge spanning a stream which crossed the line of a city street, and was drowned. The defense was that, though the city had power to lay a tax to light its streets, that power did not include the lighting of bridges. But the court rejected this defense, and said: "It seems to us to be obvious that a bridge over a stream crossing a street is a part of the street. It is as much so as the cover placed over a drain, or a sewer crossing a street. Persons travel over it as they do over other portions of the street. It is, and must be, a part of the street." In *McDonald v. Ashland* 78 Wis. 251, 47 N. W. 434, a bridge built by a private citizen with lumber furnished by the city and forming part of a platted street used by pedestrians was held to be a public way; and in *Birmingham v. Rochester City Railway Co.*, 137 N. Y. 13, 32 N. E. 995, 18 L. R. A. 764, a bridge over a canal intersecting a highway was held to be part of the highway; the court saying: "In substance and effect, it is nothing more than a continuation of the city street." We have been referred to but one case claimed to sustain the contention of the appellee, viz., *Cedar Rapids v. Railway Co.*, 108 Iowa, 406 79 N. W. 125. In that case the city granted the right to lay its tracks on "the streets, avenues, and bridges of the city," but in terms imposed the duty of repairs only as to paved streets. That case comes within the rule of "*Expressio unius, exclusio alterius*," but, in so far as it may on other grounds sustain the contention of the appellee, we cannot accept it as satisfactory authority.

We now come to the second question in the case—whether there is such a privity of contract between the parties to this suit as entitles the plaintiff to any recovery. The contention of the plaintiff, in the language of its brief, is "that, where two persons are legally liable to a third person for the same thing ex contractu, if one of said two persons performs the whole obligation to said third person, the other of said two persons is liable to the one who has so performed in direct proportion as he is liable to said third person." The right of the railway company to maintain its tracks upon these two bridges under the ordinances of 1859 and 1880 was vested, and its liability to the city to keep in repair the space occupied by its tracks and two feet on either side thereof, was fixed, when under the ordinances of 1868 and 1890, respectively, the railroad company became liable to the city for the construction and maintenance of the bridges then erected. The trackage rights of the railway company on these bridges as parts of the streets was not thereby divested, nor was its liability to

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the city for repair of its tracks thereon thereby released or extinguished. It continued unimpaired, though the city could thereafter, at its pleasure, call upon the railroad company to make all the needed repairs, or upon the railway company for the limited repairs for which it is liable, and upon the railroad company for all other needful repairs, and, upon performance by the railroad company of the primary and continuing duty of the railway company to make its limited repairs, the contract of the railway company with the city ought to enure to the benefit of the railroad company, and, if the legal proposition of the plaintiff stated above is sustained by satisfactory authority, it does so enure. Two cases from the Supreme Court of Massachusetts are so strongly in point as to justify extended reference to them. The first of these cases is the *City of Lowell v. Proprietors of Locks and Canals*, 104 Mass. 18. The canal owners constructed a canal across a public highway in the city of Lowell, and built a bridge to restore the severed highway. A street railway had a grant for its tracks on this highway, upon condition that it should keep in repair the space between its rails and 18 inches on either side, both on streets and bridges; and its tracks were accordingly laid on this bridge when it was opened for use. In the course of time repairs became necessary within the limits of the railway company's liability, and the city called upon the canal company to make such repairs. The canal company refused to make them on the ground that they could only be demanded of the railway company. The city sued the canal owners, and the court held that, as the owners had built the bridge to carry their canal across the highway, they were liable to the city in the first instance for its maintenance, and for all necessary repairs. The canal owners then brought suit against the railway company both for the amount recovered from it by the city and also for some subsequent repairs made by it within the railway company's limits, and a recovery was allowed. *Proprietors of Locks and Canals v. Lowell Horse Railroad Corporation*, 109 Mass. 221. The court said "that a street railway corporation, whose charter requires it to repair such portions of all bridges in a city as are occupied by its tracks, is bound to repair such a portion of a bridge which the owners of a canal have built over the canal, and which as against the city he is bound to repair; and, if on his refusal the city makes such repairs and recovers judgment against him for the expense thereof, he can recover from the corporation the amount of the damages recovered by the city against him. * * * The duty thus imposed upon the defendant of repairing a part of a bridge, the whole of which, as between them and the city, the plaintiffs were obliged to maintain, was an obligation to do that which would be a benefit to the plaintiffs, assumed by the railway company in the acceptance of their charter, and the plaintiffs, having been obliged to meet that liability to the city, through the neglect of the defendant are entitled to recover the amount paid in discharge of it. *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Brewer v. Dyer*, 7 Cush. 337." ' In *Carnegie v. Morrison*, Chief Justice

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Shaw said: "The law operating upon the act of the parties creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. The same instrument may constitute a contract between the original parties, and also between one or both of them, and others who may subsequently assent thereto, and become interested in its execution." A case more closely analogous in the relation of all the parties can scarcely be found, and the Massachusetts decisions are everywhere regarded as high authority. In *Small v. Schaefer*, 24 Md. 158, the Court of Appeals of this state adopts the view expressed by Chief Justice Shaw in *Carnegie v. Morrison*, *supra*, and quotes with approval the following passages from the opinion in that case: "When one person, for a valuable consideration, engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement." This is not the Massachusetts law alone. In *Hendrick v. Lindsay*, 93 U. S. 149, 23 L. Ed. 855, the Supreme Court of the United States said, "The right of a third party to maintain assumpsit on a promise not under seal to a third party for his benefit, although much controverted, is now the prevailing rule in this country;" and cites the same author cited in *Small v. Schaefer*, 24 Md. 143; 1 Parsons on Contracts (6th Ed.) 467.

It is not necessary, as contended by the appellee, that the contract must have been entered into at the time for the benefit of some particular third person. "If the person for whose benefit a contract is made has either a legal or equitable interest in the performance of the contract, he need not necessarily be privy to the consideration." 9 Cyc. 381. The rule is thus stated in 7 Enc. of Law (2d Ed.) 107: "To have this effect, the contract must have been entered into for his benefit, or at least such benefit must be the direct result of performance and within the contemplation of the parties."

The following cases from the New York Court of Appeals illustrate the judicial view generally: In *Coster v. Albany*, 43 N. Y. 399, a statute authorized as a public improvement a bridge connecting a pier with the adjoining land, the removal of which made it necessary in order to reach plaintiff's store to go over another more distant bridge. The statute provided that all damages caused to property should be paid by the city. The court said: "The result of the passage of the law and the assent of the city to its provisions was to put the city in the place of the state as to damages. Here is the promise, the consideration, and the promisee definitely brought out. The ultimate beneficiary is uncertain. The third person need not be privy to the consideration, nor need he be specially named." The city was held liable for direct, but not for remote damages. In *Little v. Banks*, 85 N. Y. 258, it was held that "contractors with the state who assume for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable in case of neglect to perform such covenant to a private action at the suit of the party in-

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jured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance." These cases and the reasoning upon which they are founded are satisfactory to us as controlling the present case, and we are therefore of opinion that there was error in sustaining the demurrer to the fifth count of the declaration.

The sixth count of the declaration proceeds upon the theory of the defendant that these bridges are not parts of streets, but maintains that the defendant is nevertheless liable for the increased cost of repairs caused by the construction, maintenance, and operation of the defendant's tracks on said bridges; they being upon the theory of that count the exclusive property of the plaintiff which the defendant cannot use without just compensation for such use. Having determined that said bridges are parts of said streets within the meaning of the ordinances which impose upon the defendant the liability to repair, and fix the measure of recovery to which the plaintiff is entitled, there was no error in sustaining the demurrer to the sixth count in the declaration.

For the error in sustaining the demurrer to the fifth count, the judgment must be reversed.

Judgment reversed, with costs to the appellant above and below, and new trial awarded.

ROBERT M. GREEN, Plff. in Err., v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

(Submitted April 8, 1907. Decided April 29, 1907.)

[27 Sup. Ct. Rep. 595.]

Writ and Process—Service on Foreign Corporation—What Is Doing Business.*—Soliciting through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment making absolute a rule to show cause why the service of summons upon a foreign corporation should not be vacated, on the ground that the corporation was not doing business in the district. Affirmed.

See same case below, 147 Fed. 767.

The facts are stated in the opinion.

*As to where actions against railroads may be brought, and upon whom, in such actions, summons may be served, see foot-notes appended to *Coakley v. Southern Ry. Co. (Ga.)*, 13 R. R. R. 371, 36 Am. & Eng. R. Cas., N. S., 371.

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Messrs. John G. Johnson and Frank P. Prichard, for plaintiff in error.

Mr. Francis Rawle, for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court:

The plaintiff in error, a citizen of Pennsylvania, brought an action in the circuit court for the eastern district of Pennsylvania to recover damages for personal injuries alleged to have been incurred in Colorado through the negligence of the defendant, against the defendant in error, a corporation created by the laws of the state of Iowa, and, therefore, for jurisdictional purposes, a citizen of that state. The return upon the writ shows a service "on Chicago, Burlington, & Quincy Railway Company, a corporation which is doing business in the eastern district of Pennsylvania * * * by giving a true and attested copy to Harry E. Heller, agent of said corporation." The defendant appeared specially for the purpose of disputing jurisdiction. The circuit court held that the service was insufficient, because the defendant was not doing business within the district, and that decision is brought here by writ of error for review.

The jurisdiction of the circuit court in this case was founded solely upon the fact that the parties were citizens of different states. In such a case the suit may be brought in the district of the residence of either. Act of March 3, 1875, chap. 137, § 1 [18 Stat. at L. 470, chap. 137], as corrected by act of August 13, 1888, chap. 866, § 1 (25 Stat. at L. 434, U. S. Comp. Stat. 1901, p. 508). But to obtain jurisdiction there must be service, and the service was upon the corporation in the eastern district of Pennsylvania. Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that, through its agents, it was present there.

The eastern point of the defendant's line of railroad was at Chicago, whence its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers, and the construction, maintenance, and operation of a railroad for that purpose. As incidental and collateral to that business it was proper, and, according to the business methods generally pursued, probably essential, that freight and passenger traffic should be solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. For conducting this business several clerks and various traveling passenger and freight agents were employed, who reported to the agent and acted under his direction. He sold no tickets and received no payments for transportation of freight. When a prospective passenger desired a ticket, and

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applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington & Quincy Railroad a ticket over that road. Occasionally he sold to railroad employees, who already had tickets over intermediate lines, orders for reduced rates over the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's line. In these bills of lading it was recited that they should not be in force until the freight had been actually received by the defendant.

The question here is whether service upon the agent was sufficient; and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 738, and *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts.

The business shown in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute "doing business" in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower Federal courts. *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. 286; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.*, 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 420; *Union Associated Press v. Times-Star Co.*, 84 Fed. 419; *Earle v. Chesapeake & O. R. Co.*, 127 Fed. 235.

The judgment of the Circuit Court is affirmed.

TOWN OF ARLINGTON v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia, Feb. 18, 1907.)

[56 S. E. Rep. 1015.]

Licenses—Municipal Corporations—Occupation Tax—Railroads.—Following the ruling in *City Council of Augusta v. Central Railroad*, 78 Ga. 119, there is no authority vested in any municipality in this state to levy and collect an occupation tax upon a commercial railroad doing business in such municipality.

Warehousemen—Commercial Railroads.*—A commercial railroad, which maintains a warehouse merely for the purpose of receiving goods for shipment and storing goods shipped to such point and does not seek or solicit goods for storage, but merely stores in such warehouse the goods of consignees, for the reason that such consignees fail or refuse to call for and receive the same, and charges only for such storage the amount authorized by the railroad commission of the state, and for the time so authorized, is not subject to the provision of a municipal ordinance levying an occupation tax upon warehousemen. When a municipality is prohibited by law from taxing the general business of a commercial railroad as a common carrier, it cannot segregate from such business a necessary incident and classify it as an occupation and tax it as such.

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by the Central of Georgia Railway Company against the town of Arlington. Judgment for plaintiff. Defendant brings error. Affirmed.

The Central of Georgia Railway Company brought an equitable petition against the town of Arlington, alleging that the plaintiff is a railway company, engaged in the business of a common carrier over various lines of railroad in this state and in the state of Alabama; that it owns the line of track which runs through the town of Arlington, and in that town maintains a ticket office and waiting room, which is a part of its freight and passenger depot; that the authorities of the town of Arlington have passed an ordinance imposing upon plaintiff a specific business or occupation tax, amounting to \$10; that the plaintiff has refused to pay this tax, and the town authorities have issued an execution which they are threatening to levy upon the property of plaintiff. Plaintiff avers that it is not engaged in any business in the town

*For the authorities in this series on the subject of the right to impose an occupation tax upon railroad companies, see foot-notes appended to *Norfolk & W. Ry. Co. v. Town of Suffolk (Va.)*, 14 R. R. R. 440, 37 Am. & Eng. R. Cas., N. S., 440; *Cumberland T. & T. Co. v. Hopkins (Ky.)*, 18 R. R. R. 673, 41 Am. & Eng. R. Cas., N. S., 673.

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of Arlington, except such as is authorized by its charter and the laws of this state and the rules of the railroad commission as a common carrier of freight and passengers, and that the ordinance levying the tax above referred to is null and void, for the reason that the plaintiff is a common carrier, engaged in the business of carrying freight and passengers from and to various points within and without the state of Georgia, and is not engaged in any business in the town of Arlington as a common carrier, or any other business, except such as it is authorized to do by its charter, the laws of the state, and the rules of the railroad commission; and the town authorities have no power, under its charter, to impose a business or occupation tax upon it. The prayer is for an injunction. The defendant filed an answer, in which it admitted that the plaintiff was a common carrier of freight and passengers as alleged, and averred that it kept and maintained at Arlington a warehouse and storage room for goods, wares, and merchandise, and charged storage thereon, not as a common carrier of freight, but as a warehouseman, and that it was liable to tax as a warehouseman under the ordinances of the town.

At the hearing the following evidence was introduced: J. G. Jackson testified that he was agent for the plaintiff at the town of Arlington, and that the company maintained a ticket office and waiting room as a part of its freight and passenger depot in that town, and that plaintiff is not engaged in any business in the town of Arlington except that which is usually engaged in by a railway company as a common carrier; that it is not engaged in the warehouse business, and does not receive, for the purpose of storage, from the citizens of Arlington or any other persons, any articles of merchandise, and does not charge for the storage of articles delivered to it at Arlington for shipment, but that where articles have been shipped for delivery to persons in Arlington, and they remain in the depot and are not taken out in a reasonable time, in accordance with the storage rules of the railroad commission of Georgia, the plaintiff does charge storage on such articles, but does not charge any more than is authorized by the rules of the railroad commission. A certain ordinance of the town of Arlington was introduced in evidence, as follows: "Be it enacted by the town council of Arlington, Ga., that the following specific tax is levied in said town, to wit: Upon each common carrier not otherwise taxed under the ordinances of said town, upon all their business and occupation carried on in said town which is of such character as to be subject to taxation by said town council, the sum of ten dollars. It is the intention of this ordinance that whenever a railroad company or common carrier shall make any charge for any act or service performed by it wholly within the incorporated limits of said town, and sufficiently within the limits of said town as to be subject to taxing jurisdiction, such as the making of warehouse or demurrage charges for the holding or storing goods in said town, whether the premises on which the storing or holding of such goods be the premises of such carrier or not, or whether the interest of such carrier in such charges be

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sole or joint with some one else, such carrier shall be subject to this tax. And the enumerations herein contained of examples shall not be restrictive to such carrier, but such carrier shall be liable for the tax upon any business within said town which can be lawfully taxed by said town, but shall not apply to carriers who have paid the lawful business tax equal to said sum in said town upon said occupation, or any part thereof, during the present year. Passed in open council March 3, 1903." Also the following ordinance: "Be it ordained by the mayor and council of the town of Arlington, and it is hereby ordained by authority of same, that from the adoption of this ordinance the business tax shall be as follows: For the fiscal year beginning the first Tuesday in September, 1904, and ending the first Tuesday in September, 1905 [enumerating subjects of taxation]: Each railroad company, \$10.00. This ordinance passed the 7th day of September, 1904." Also the following ordinance: "Be it ordained by the mayor and council of the town of Arlington, and it is hereby ordained by authority of the same, that from the adoption of this ordinance the business tax shall be as follows: For the fiscal year beginning the first Tuesday in September, 1905, and ending the first Tuesday in September, 1906 [enumerating subjects of taxation]: Each railroad, \$10.00. This ordinance passed the 8th day of September, 1905." The execution issued against plaintiff was also introduced. The defendant introduced the affidavits of five individuals, who each testified that they had had freight shipped to them at Arlington, and after such freight had been stored in the warehouse of plaintiff, each had been compelled to pay storage charges. L. L. Lyons testified that the plaintiff had paid the business tax of the character sought to be collected for the two years preceding the year in which the tax now in question was levied.

After hearing the evidence the judge granted the injunction as prayed, and the defendant excepted.

Jesse W. Walters, for plaintiff in error.

Wooten & Hofmayer and *Donalson & Donalson*, for defendant in error.

COBB, P. J. (after stating the facts). 1. In the case of *City Council of Augusta v. Central Railroad*, 78 Ga. 119, it was held that a municipal corporation of this state had no power to levy an occupation tax upon what is known as a "commercial railroad company," as distinguished from a "street railroad company." In that case the city authorities of Augusta had embraced in their ordinance levying specific taxes the following item: "On all railroads, \$500." Mr. Justice Blandford says: "The ordinance of the city, taxing railroads, is not a tax on business occupations. A railroad itself does not carry on any business occupation. It is merely property. It is not a person or an individual, so as to be an inhabitant or resident of the city of Augusta. If a railroad company, which is a corporation, should carry on a business in the city

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of Augusta, such as warehouseman, broker, drayage, or commission business, etc., it would be liable to be taxed as any other person carrying on a like business. But, if the railroad company merely does such business as they are authorized to do under their charter as carriers of freight and passengers, then there is no authority in the city of Augusta to levy a specific tax against them for such business or occupation; but the right to tax such corporations is reserved to the state by Acts Leg. 1874, p. 103. This act provides that a return shall be made by the presidents of all railroad companies in this state to the Comptroller General, and that the property be taxed as the property of other people of this state. There is no authority vested in any city in this state to levy and collect such tax, except there be property in such city owned by a railroad company disconnected with the operation of such road." This ruling has never been followed, and the case has never been referred to in specific terms of approval. In *Atlanta National Ass'n v. Stewart*, 109 Ga. 94, 35 S. E. 73, the case is referred to simply to show that no constitutional question was involved therein, and that the decision was merely the construction of a statute. In *Staten v. S. F. & W. Ry. Co.*, 111 Ga. 803, 36 S. E. 938, it is cited with other cases simply to show that prior to the act of October 16, 1889, providing a "system for the taxation of railroad property by counties," there was no machinery provided by the General Assembly for the assessment and collection of county taxes on railroad property. In *Savannah, Thunderbolt & Isle of Hope Railway v. Savannah*, 112 Ga. 164, 37 S. E. 393, it is distinguished from the case then in hand, which dealt with the levying of an occupation tax upon street railway companies located wholly within the city, and the ruling is neither approved nor disapproved in terms. In *Sou. Exp. Co. v. Rose*, 124 Ga. 595, 53 S. E. 190, 5 L. R. A. (N. S.) 619, the writer expressed his dissatisfaction with the ruling, in the following language: "I do not think that this decision is sound, but of course it must be respected as the law until it is overruled. I see no reason why a municipal corporation, under a general power to levy occupation taxes, can not levy an occupation tax upon commercial railroad companies engaged in the business of common carriers in the city, just as they levy an occupation tax upon telegraph, telephone, and similar companies." But the decision has never been overruled, and there is no request for a review in the case now before us, and therefore it must be treated as binding authority, until it is disapproved in the manner provided by the statute. It is absolutely controlling in the present case. It is immaterial what may be the language of the charter of the town of Arlington in reference to its power to levy occupation taxes. It is impossible for a municipal charter to be broader in its terms in this respect than was that of the city of Augusta; still it was held, in the case we are now following, that the statute which dealt with the subject of ad valorem tax on the property of railroads prevented the provision of the charter in reference to occupation taxes from becoming operative.

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2. Counsel for the plaintiff in error, as has been stated, did not ask leave to review the case above referred to, but insists that the case now before us is within the exception referred to in the opinion of Mr. Justice Blandford; that is, that the railway company is carrying on a separate and distinct business as a warehouseman, and is liable, under the ordinance, for an occupation tax as upon that business. If the railroad company was engaged in the business of a warehouseman, separate and distinct from its business as a common carrier, the position might be well taken; but it appears distinctly from the record that the railroad company, so far as it discharges those duties and makes those demands which are incident to the business of a warehouseman, is simply doing this because it is a necessary incident to its business as a common carrier. It receives no goods or wares from people in Arlington or elsewhere merely for storage. When the shipment has been completed, and the consignee fails or refuses to call for and receive the goods within a reasonable time after they have reached their destination, it stores such goods in its freight house, and charges for such storage in the amounts and in the manner which the railroad commission has provided may be done by common carriers of freight. It neither seeks nor desires to have goods for storage. When compelled, on account of the conduct of the consignee, to store them, it exacts only the storage fees provided by that tribunal, which regulates its business as a common carrier. If it cannot be taxed as a common carrier, a mere incident to its business in such capacity cannot be segregated from its business in its entirety and made subject of an occupation tax. See, in this connection, *Hewin v. City of Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

Judgment affirmed. All the Justices concur, except Fish, C. J., absent.

NASHVILLE, C. & ST. L. RY. v. KARTHAUS *et al.*

(Supreme Court of Alabama, April 20, 1907. Rehearing Denied May 6, 1907.)

[43 So. Rep. 791.]

Appeal—Harmless Error—Striking Pleas.—The erroneous striking of pleas was harmless, when the defenses set up thereby were admitted under the general issue.

Executors and Administrators—Injury to Land in Life of Decedent—Action by Heirs.—The heirs of a decedent may maintain trover for sand taken from the lands of the decedent during his lifetime notwithstanding that there is an administrator, where he has never taken any possession of the lands.

Railroads—Right of Way—Rights Acquired.*—A railroad, having a

*For the authorities in this series on the subject of the title acquired, by deed or condemnation proceedings, in land conveyed or condemned for a railroad right of way, see foot-notes appended to *Littlejohn v. Chicago, etc., Ry. Co.* (Ill.), 22 R. R. R. 409, 45 Am. & Eng. R. Cas., N. S., 409.

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right of way over certain lands, had no right to excavate sand from the right of way and sell it.

Trover and Conversion—Property Subject.—Where a railroad, having a right of way over certain lands, excavated sand from the right of way and sold it, it was liable to the owner of the land in trover, although the sand was loaded directly on the cars whereby it was transported to the purchaser.

Evidence—Hearsay.—In an action against a railroad for the conversion of sand taken from certain land, testimony of a witness that he had always heard that the railroad had a right of way through the land was properly excluded as hearsay.

Trover and Conversion—Measure of Damages.—In trover against one who removed sand from plaintiff's land and sold it, the measure of damages was the value of the sand, with interest at the place of sale.

Depositions—Actions in Which Deposition May Be Taken.—Code 1896, § 1850, permitting interrogatories to be filed by either party to the other in a civil suit, is applicable to an action in trover for the conversion of sand taken by defendant from plaintiff's land.

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by Ernest C. Karthaus and others against the Nashville, Chattanooga & St. Louis Railway. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

This was an action begun by the heirs of Karthaus to recover damages for certain sand, alleged to have been taken by the railroad from its right of way through and on plaintiffs' land and sold in the market. The defendant insisted, by way of defense, that the sand was taken off of the 100-foot right of way owned by the road, and that the sand belonged to defendant, and not to the plaintiffs.

O. R. Hundley, for appellant.

Cooper & Foster, for appellees.

HARALSON, J. 1. The suit was by the heirs of E. Karthaus, against the Nashville, Chattanooga & St. Louis Railway, to recover \$2,500 for the conversion by it, at different times between April 16, 1900 (the date of the death of said Karthaus), and August 29, 1902 (the date of the institution of this suit), of 6,000 cubic yards of sand, alleged to be the property of the plaintiffs.

The complaint as first filed, contained a count for the conversion of the sand in 1900-1902, and a count, also, for trespass for taking the sand. As a result of the pleading in the cause, this complaint was amended by striking out the count in trespass, and amending the trover count, so as to claim damages for sand taken after the death of Karthaus, the original owner of the land and father of plaintiffs, up to the time of the bringing of this suit.

There were pleas filed by the defendant,—of not guilty, and the statute of limitations of six years. Other pleas were stricken, on

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the ground that the matters and things set up in them, if available as a defense, were available under the general issue. It appears that all these defenses were allowed to be shown in the progress of the trial, under that issue, and, if there was error in striking said pleas, it was error without injury.

2. The main matters of defense were, that the plaintiffs were not in legal possession of the lands from which the sand was taken, and that it was taken from lands owned by E. Karthaus, the father of plaintiffs, in his lifetime; that at the time of the bringing of this suit, said Karthaus was dead, and there was an administrator of his estate duly appointed and qualified, and who was acting as such.

3. Considering the case under the general issue and as though the plea in respect to an administration on the estate of said Karthaus had not been stricken, it appears that Carrie A. Karthaus, the widow of deceased was, on the 25th of May, 1900, duly appointed and commissioned as administratrix of said estate, and on November 1, 1904, she reported that the assets of said estate had been applied to the payment of the debts of her intestate which had come to her knowledge, and she had made distribution to the children and heirs at law of said decedent. There was no evidence of any other debts remaining unpaid, nor that the administratrix had ever taken possession or control of any of the real estate of her intestate for the purpose of administration.

In *Callhoun v. Fletcher*, 63 Ala. 580, it was held, "that, upon the death of one seised of a hereditary estate in lands, the title descends, eo instante, and vests in the heir at law; * * * that to suspend or destroy the heir's right to the possession of the inheritance, the personal representative must actually take possession or must assert his right, and follow it up with the means necessary to that end, * * * and that, pending administration, it is only actual possession of the personal representative, or his asserted right thereto, followed up by proceedings to obtain possession, or his asserted right to the rents, income and profits, that can take away, or suspend, the right of the heir (or devisee) to prosecute a suit for the possession of lands descended or devised, or any other action which such heir (or devisee) could maintain by the rules of the common law. It requires action by the personal representative to divest the heir of his right to the inheritance, with all common-law incidents; and in the absence of action, effective action, the right remains with the heir." To the same effect is *Leatherwood v. Sullivan*, 81 Ala. 463, 1 South. 718; *Stovall v. Clay*, 108 Ala. 105, 20 South. 387; *Banks v. Speers*, 97 Ala. 562, 11 South. 841. This defense was, therefore unavailing.

4. It is contended by defendant, that it was in the adverse possession of the land, from which the sand was taken. The defendant claims and can claim nothing but an easement through these lands, which is never adverse to the owner, except for railroad purposes.

But, however long it may have had possession of this easement,

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it had the right to the use of the land for purposes of proper construction and maintenance of its road, and had no right to make excavations, or sever any part of the corpus of the property or convert it to any use except for railroad purposes.

In *Vermilya v. C. M. & St. P. Ry. Co.*, 24 N. W. 234, 66 Iowa, 606, 55 Am. Rep. 281, it was said: "When the right of way is acquired by *ad quod damnum* proceedings under the statute, the title of the timber, sand and the like, found upon the land, remains in the owner, and can be used by the corporation owning the railroad, only for the purposes connected with its construction and use"—citing *Preston v. Dubuque & P. R. Co.*, 11 Iowa, 15; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288.

In *Aldrich v. Drury*, 5 Am. Rep. 624, 8 R. I. 554, the court held that "a railroad company, or any contractor employed by them to build a railroad, may use any material removed by them in grading the road, either in the adjacent, or it seems, in other localities, but they have no right to sell such material to other parties." What the court said in this connection, is so applicable to the case in hand, we venture to quote it:

"The property which they have in land within their location, has been likened to that which the public has in a highway; but owing to the peculiar purposes to which it is subservient, it is, and must be, in practical effect much more absolute and conclusive. * * * But, nevertheless, it does not extend beyond the exigencies of the road, and, therefore, while it entitles the company to use the earth gravel and stone within their location for all railway purposes, it does not entitle them to sell any such material. To allow them to sell would be to allow an abuse of their privileges to take land by compulsory process; for the privilege is accorded on the ground, that the land is taken for a public use, a railroad being deemed such, and not to sell again, either wholly or in part. It is urged in justification of defendant, that it was necessary, in bringing the road to grade, to make the cut and remove the stone. This may be, but, in order to do this, it was not necessary for him (the contractor) to sell the stone; and when he did sell the stone, under the sanction of the company, he did that which neither he nor the company had the right to do. Except for the purposes of the road, the stone belonged to the plaintiff, and, therefore, when, with the assent of the company, the defendant sold it, he sold the property of the plaintiff. Accordingly, we think the plaintiff, waiving the tort, may recover the proceeds of the sale in this action."

In *Morgan v. Donovan*, 58 Ala. 241, 263, construing a mortgage to a railroad, the court said: "The mortgage conveyed only such property, real and personal, as was useful and necessary, and employed in the construction, maintenance, operation, preservation, repair or security of the road, and that property owned or acquired, and not used, or to be used in connection with the railroad, and in promotion of the direct and proximate purposes of its construction, was not thereby conveyed."

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Quoting this case approvingly, it was said in *Wilks v. G. P. R. Co.*, 79 Ala. 186, that "ownership of land, or an easement in land, except for purposes of its construction and operation, is not among the incidental powers of such corporation."

It must be held, therefore, that the company had no right to sell this sand to outside persons.

5. Defendant's counsel contend that, conceding defendant wrongfully took the plaintiff's sand, the action would be in trespass and not trover.

The reason for this insistence may be better stated in the language of counsel, who says in brief: "It must be remembered that the testimony shows without conflict, that the sand was a part of the realty on the land described in the deed. It was loaded on the cars of the defendant railway and carried away. It was never taken out of the sand bank and left on the land for a moment; the cars were simply loaded from the sand bank direct." It is here apparently contended, that if the sand had been taken from the bank and piled on the land or bank of the cut, it would cease to be realty and would become personalty, but if loaded first on the cars of defendant it would be realty still, or would not be personalty. The distinction is of difficult perception. It is well established, that trover will lie for the conversion of trees, minerals, etc., which counsel does not dispute. In *Glencoe L. & G. Co. v. Hudson*, 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 563, the court say: "Sand or gravel, while in its original bed, is as much a part of the realty as the earth itself. After it has been mined or separated from the land it may become the subject of conversion, not before."

It is like growing crops on land, which unsevered are a part of the realty, but when severed, become personal property. *Thweat v. Stamps*, 67 Ala. 96.

6. There was no error in sustaining the objections to the statement of the witness Romines, that he had always heard that the railroad had the right of way through the land. It was purely hearsay, and was, also, immaterial.

7. Ordinarily, the measure of damages in an action of trover is the value of the personalty converted, with interest to the time of the trial. The measure of damages in this case was not the value of the sand in the bank, before it became personalty after severance from the freehold. It is manifest that the plaintiff should not be confined to the value of the sand to the place where the severance actually occurred. As counsel for plaintiff well say, "If defendant had been detected in the act of loading the cars with sand or of removing it from one point to another, and suit had then been brought, the defendant could have answered that it took the sand for the purpose of use in the maintenance of its road, which it would have had the right to do, and it was only when it sold the sand, that its purposes or intentions were definitely made manifest and ascertained, and so the place of sale

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was, really, the place of conversion, and the value of the property there, constituted the measure of damages.

8. The fact that Mr. Karthaus paid only \$450 for the tract of land on which the road was built was an immaterial fact.

9. There was nothing in the objection raised against allowing interrogatories to be filed by the plaintiff to the defendant, because the action was in trover. Section 1850, Code 1896, is applicable to all civil suits, and this one was of that character. *S. R. R. Co. v. Bush*, 122 Ala. 472, 26 South, 168.

We have examined the charges of defendant which were refused and find no reversible error in their refusal.

There appears to be no reason for sustaining the motion for a new trial.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON JJ., concur.

SAVAGE v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, July 2, 1907.)

[67 Atl. Rep. 633.]

Master and Servant—Death of Servant—Contributory Negligence.—In an action for injuries causing death of street railway conductor, held that there was a failure to show freedom from contributory negligence.

Same—Negligence—Evidence—Admissibility.—In an action against a street railway company for the death of a conductor struck by an electric light pole near the track, evidence of the speed of the car was not evidence of negligence of the company, where the speed was subject to the control of the conductor.

Evidence—Presumptions—Avoidance of Danger.*—In an action for negligent death, the presumption that decedent exercised due care is one of law and has no weight, where testimony of eyewitnesses discloses the circumstances of the accident, whether offered by plaintiff or defendant.

Master and Servant—Nonobvious Dangers—Duty to Warn Employee.†—Where the danger to a street car conductor in consequence of an electric light pole being maintained near the track was either

*See note at end of case.

†For the authorities in this series on the subject of the duty to warn and instruct employees, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361; *Richards v. Sloss-Sheffield Steel & Iron Co.* (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36; *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225.

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not obvious or extraordinary, it was the duty of the company to warn the conductor of the danger and instruct him with respect thereto.

Evidence—Weight and Sufficiency—Uncontradicted Evidence.—In an action against a street railway company for the death of a conductor colliding with an electric light pole near the track, where an employee who had instructed the conductor testified that he warned him of the danger from the pole, and he was not contradicted nor impeached, nor was there anything to throw any doubt on the truth of his testimony, the jury were not warranted in finding for plaintiff, on the ground that the company had not sustained the burden of proving the giving of a special warning.

Appeal—Erroneous Admission of Evidence—Prejudicial Error.—Where, in an action against a street railway company for the death of a conductor colliding with an electric light pole near the track, the court admitted evidence as to the speed of the car at the time of the accident, though the declaration did not make speed an element of the company's negligence, to show negligence on its part, an exception would be sustained, though the testimony shed light on the case only in relation to contributory negligence of the conductor.

Trial—Evidence—Misleading Instructions.—Where, in an action against a street railway company for the death of a conductor colliding with an electric light pole near the track, an employee testified that, while instructing the conductor, he warned him of the danger of the pole, and the testimony was not contradicted and the employee was not impeached, an instruction that, if the conductor had notice of the existence of the pole and the danger arising therefrom, the company was not liable, that on the one hand the jury had the testimony of the employee, and on the other hand the conductor, who was dead, could not testify, and that the question depended on the credibility of the employee, was objectionable as leading the jury to ignore his testimony.

Trial—Instructions—Instructions Already Given.—Where, in an action against a street railway company for the death of a conductor colliding with an electric light pole near the track, the evidence authorized a finding that the danger from the pole was a nonobvious and extraordinary risk, and the court properly instructed as to the burden of proof of notice of the danger, the refusal to charge that the burden was on plaintiff to prove by preponderance of evidence that the conductor was ignorant of the danger was proper.

Exceptions from Superior Court, Providence County.

Action by Mattie A. F. Savage against the Rhode Island Company. There was a judgment for plaintiff, and defendant brings exceptions. Sustained, and cause remitted for new trial.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Gardner, Pirce & Thornley, Frank S. Arnold, and Davis G. Arnold (William W. Moss, of counsel), for plaintiff.

Henry W. Hayes, for defendant.

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PARKHURST, J. This is an action brought under the statute by the plaintiff as administratrix of the estate of William H. Savage, and for the benefit of herself as his widow, to recover damages for his death, alleged to have been due to the defendant's negligence. It was tried before a jury in the superior court for Providence county, December 19, 20, and 21, 1906. It appears by the testimony in the case that Savage, the plaintiff's intestate, a man 24 years old, had entered the employ of the defendant as conductor, Saturday, July 18, 1903, the day before he was killed, and was put on the line between Providence and Crescent Park. He made three round trips with George L. Phillips, an experienced conductor, during the afternoon and evening of that day, and the next day (Sunday) he took full charge of a car. On the trip when he was killed he left Crescent Park with his car, an open bloomer car, a little before 6 o'clock in the evening. The car was crowded, and men were standing on the running board. Along Pawtucket avenue, in the vicinity of the place of the accident, the track for cars coming toward Providence was on the east side of the street next to the sidewalk, not far from a series of poles carrying electric light wires. According to the rules of the defendant company, the running board was down on the right side next to the sidewalk and the poles, and on the left side the running board was up and the bar at the end of the seats down. As the car was traveling in the neighborhood of Mr. Henry Ide's house, which is on the west side of Pawtucket avenue, the conductor, Savage, went along the running board collecting fares or giving out transfers, and had to pass outside of a man standing on the running board. As he did so his head collided violently with an electric light pole, belonging to the Narragansett Electric Lighting Company, located beside the track, and he was knocked to the ground. When the car had been brought to a stop 200 feet or more beyond the pole, several men went back and carried him into Mr. Ide's house. He had one or two severe wounds on the right side of his head, and died shortly afterwards without regaining consciousness. The pole with which Savage collided was somewhat nearer the track than other poles along that street. It had been in the same position at least all that summer, and apparently for a number of years, and it was enough nearer to the track than other poles in its vicinity so as to be the subject of special warning to the plaintiff's intestate to look out for it himself and to warn his passengers of it when they were upon the running board. The jury found a verdict for the plaintiff for \$5,000. The defendant then filed a motion for a new trial, on the grounds that the verdict was contrary to the evidence, and the weight thereof; that the verdict was contrary to the law; and that the amount of damages was excessive. This motion was overruled, and the defendant's exception noted. The case is now before this court on a bill of exceptions filed by the defendant, and allowed by the court, incorporating all the exceptions taken by the defendant throughout the case.

The main questions are: (1) Was the verdict so clearly against

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the evidence that a new trial should be granted by the Supreme Court on that ground? (2) Were the damages awarded so clearly excessive that a new trial should be granted on that ground? (3) Was the burden upon the defendant to prove that the deceased had notice of the dangerous proximity of the pole to the track, if that was an extraordinary risk and not an obvious one, or was the burden upon the plaintiff to show that the deceased had no such notice? (4) Did the jury have the right to disbelieve the testimony of the witness Phillips, that he pointed out the pole to the deceased and warned him of the danger from it, or were they bound to accept his testimony as conclusive on that vital point in the case? (5) Was there any reversible error in the numerous exceptions, or any of them brought up by the bill of exceptions? A careful reading of the record of testimony convinces us that the verdict was against the weight of the evidence. As relating to the question whether the plaintiff was married to William H. Savage, and so entitled to sue for her own benefit as his lawful widow, there was sufficient evidence to warrant the jury in finding for the plaintiff on that point.

1. On the question of contributory negligence, however, we are satisfied that the plaintiff has not proved that the deceased was in the exercise of due care at the time of the accident. So far as the evidence introduced by the plaintiff is concerned, it does not appear that the deceased conductor, at the time he was on the running board, took any precautions whatever by looking ahead to see whether he could safely swing out to pass by a passenger standing upon the running board at the time when he did so attempt to pass and was injured. It must have been known to him that there were poles and trees and similiar obstructions all along the line of the road; and, while he would be justified (in the absence of special warning or of actual knowledge) in assuming that he could safely stand and pass along the running board without danger in the ordinary way, he would not be justified in assuming that he could at any time or place swing out to any distance he might find convenient for the purposes of passing passengers standing upon the running board. If it became necessary, as it often is, so to swing out and pass, it would plainly be his duty to look ahead and see that he could pass safely in that manner. The testimony does not show that the pole in question was so near as to endanger passengers standing straight upon the running board. In fact, it shows the contrary, for it appears that there were several persons standing upon the running board at this time, none of whom were hurt, including the passenger around whom the deceased was passing at the time of the accident; and it also appears that no one had previously been hurt at that point, so far as the witness Phillips knew, who was the only witness called who had had long experience on this particular line. It therefore appears that the accident was not due solely to the proximity of the pole to the car, but to the act of the plaintiff's intestate in voluntarily placing himself in a position of more than ordinary danger, from which the simplest precaution would

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have saved him. There was also the positive testimony of the defendant's witness Phillips that on the previous day when said Phillips had the deceased under instruction, he had warned the deceased as to the proximity of this particular pole when he was passing along the running board while the car was approaching the pole, and that the deceased so warned passed it in safety. As the testimony of the witness Phillips is the subject of special attack on behalf of the plaintiff, it will be further considered hereafter.

The plaintiff also insisted, against objection by defendant, upon putting in evidence of the speed of the car at the time of the accident, showing by several witnesses an estimated speed of from 15 to 25 miles per hour. In making the offer of this testimony, and in support of its admissibility, the plaintiff's attorney said (Rec. p. 29): "The allegation is that it was running at a high rate of speed, and has bearing on contributory negligence or the negligence of the conductor in allowing himself to be hit. It is quite material, I think, to consider whether the car was running at a low speed where he could easily protect himself, or whether it was running at a high speed where obstacles of the road could come upon him quickly." The court allowed the testimony so offered to be put in.

2. The element of speed is not made a part of the allegations of the defendant's negligence in any count of the declaration; nor could it have been properly so made, because the speed of the car was subject to the control of the conductor. He had full right to regulate the speed of the car as he saw fit, to slow down or even to stop, if necessary, in order that he might safely collect his fares. In the event of a very crowded car, with many people standing upon the running board, in view of the danger of losing hold, or being jolted off the car while in motion, or in view of the danger of hitting obstructions near the rail in passing them, when it was necessary to pass around persons so standing, it might frequently be necessary to stop the car until fares could be safely collected, and the conductor would have a perfect right so to do. The speed of the car must at all times be subject to the control of the conductor, both because of the duty to obey municipal ordinances relating to speed, and because it might often be necessary to lessen the speed as a matter of safety to the passengers as well as to the conductor himself. If the testimony as to speed was properly admissible at all, and was in any way an element in contributing to the accident, it was evidence of contributory negligence on the part of the conductor himself. We can see no other way in which such testimony throws any light upon the situation. It would seem that the plaintiff's attorney, and probably the court, had in mind the more common case of the passenger injured or killed by negligence involving a consideration of excessive or dangerous speed, when the passenger has, of course no control of speed; but in this case it is obvious that the question of speed has an entirely different bearing. As the testimony was offered and insisted on by the plaintiff, against objection, the plaintiff cannot

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complain if the court makes the application of it to the question of contributory negligence, as suggested by the plaintiff in offering the testimony, even if, on the strict question of pleading, it would have been inadmissible. We shall consider this line of testimony further in passing upon the exceptions.

3. The plaintiff strenuously contends, however, that as the injured person died from his injury, and so cannot give testimony as to what he did in the way of due care, or as to what knowledge he had or what instructions he received as to the particular danger from which the injury arose, it is as if no testimony had been given bearing upon the question either of contributory negligence or of assumed risk; and so the plaintiff further contends that she is entitled to that presumption of due care, and of ignorance of any extraordinary risk, which has been sometimes held to exist in cases where no one saw the accident causing the death, and where there is no testimony to show how it occurred or any of the facts and circumstances surrounding the accident. Such cases as *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690, *Bridges v. Railroad Co.*, 7 H. L. 213, *Cogdell v. Wilmington, etc., R. Co.*, 132 N. C. 852, 44 S. E. 618, and *Baltimore, etc., R. R. Co. v. Landrigan*, 191 U. S. 461, 471, 24 Sup. Ct. 137, 48 L. Ed. 262, some of which are cited and relied upon by the plaintiff in support of this contention, all rest upon the ground that, the case being one of death from injury, there was no evidence either of due care, or want of due care, on the part of the deceased, no evidence from any witness as to how the accident occurred, or as to the facts and circumstances surrounding it. In these cases it has been said there arises a presumption of due care on the part of the injured person, so that "in the absence of evidence to the contrary" the case may go to the jury, provided there is proof of negligence on the part of the defendant; and it has been expressly held by this court, in explaining the case of *Cassidy v. Angell*, *supra*, as follows: "All that was intended by the court in its decision in *Cassidy v. Angell* was that in a case presenting the same facts the plaintiff was entitled to the benefit of a presumption that the deceased was in the exercise of the care of a person of ordinary prudence, nothing appearing to the contrary. The court did not intend to change, nor consider that it was changing, the rule, which has always been considered a settled rule in this state, that the burden of proving the exercise of due care rests on the plaintiff. Though the court hold the plaintiff entitled to the benefit of the presumption stated in such a case, yet if evidence is adduced by the defendant tending to rebut this presumption, the burden still rests on the plaintiff to satisfy the jury by a preponderance of the evidence that he was in the exercise of due care. The opinion was unfortunate in stating that the burden of proof in such case was shifted from the plaintiff to the defendant, when all that was intended was to give the plaintiff the benefit of the presumption." *Judge v. Narragansett E. L. Co.*, 21 R. I. 128, 132, 42 Atl. 507, reaffirmed in *Judge v. Narragansett E. L. Co.*, 23 R. I. 208, 211, 49 Atl. 961. The cases distinctly show that such a presumption is a mere presumption

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of law and has no weight, and so does not apply in cases where the testimony of eyewitnesses disclose the facts and circumstances of the accident, whether offered by the plaintiff or by the defendant.

The same has been held with regard to such a presumption in other jurisdictions. Thus, in *C., B. & Q. R. R. Co. v. Van Pat-tan*, 74 Ill. 91, at page 94, the court says: "There was no room to indulge in presumptions of what the intestate did or did not do, for his acts were clearly and fully in proof before the jury. Nevertheless, the court by the fifth instruction given at the instance of the plaintiff, told the jury: 'The law presumes the deceased, in approaching the mill crossing, exercised proper care and prudence; and, unless the jury believe from the evidence that the deceased did not exercise care and prudence in approaching said crossing, he cannot be regarded as guilty of negligence.' It may be, if there had been simply evidence of the defendant's negligence resulting in the injury complained of, and no evidence of what the intestate's conduct was, this instruction would have been unobjectionable. But, in view of the evidence as it was, the tendency of the instruction was to mislead, and we doubt not it did mislead, the jury. They must have understood it applied to the evidence before them; and, notwithstanding there was clear proof of the plaintiff's negligence still it must be considered with reference to the legal presumption that he was not negligent. When there is clear and incontestable proof of a fact, no presumptions can be indulged except such as arise from the proof. How much, or whether any, evidence was sufficient, in the estimation of the jury, to overcome this legal presumption that the intestate was not negligent, under the peculiar form of the instruction, can, of course, only be conjectured. It may, however, be inferred from their finding that the presumption was of controlling importance, for it is difficult otherwise to reconcile the verdict with the evidence. The instruction should have been refused, and the giving of it was error." To the same effect see *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665, 670, 29 S. W. 712; *Reed v. Queen Anne's R. R. Co.*, 4 Penn. (Del.) 413, 419, 420, 57 Atl. 529; *Day v. Railroad*, 96 Me. 207, 215, 52 Atl. 771; *McLane v. Perkins*, 92 Me. 39, 42 Atl. 25, 43 L. R. A. 487; *Wiwiowski v. L. S. & M. S. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023; *Chase v. Maine Cent. Ry. Co.*, 77 Me. 62, 52 Am. Rep. 744.

The same rule has been frequently applied in railroad cases where stock has been killed by trains, and when statutes provide that the killing shall be prima facie evidence of negligence on the part of the railroad company. In these cases the presumption thus raised is treated as a mere presumption of law, and has no weight as against direct evidence on the question of negligence. *Kentucky Central R. R. Co. v. Talbot*, 78 Ky. 621; *Volkman v. Chicago, St. P., etc., R. Co.*, 5 Dak. 69, 37 N. W. 731; *Huber v. Chicago, M. & St. P. Ry. Co.*, 6 Dak. 392, 43 N. W. 819. So, also, in railroad fire cases, where a presumption arises, from the mere fact that the fire was shown to have been caused by sparks from

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a locomotive, that this was due to the defendant's negligence, such presumption was treated as a mere presumption of law, and of no weight as against the positive, direct, uncontradicted, and unimpeached testimony of the defendant's witnesses on the subject of the defendant's negligence. *Menominee River, etc., Co. v. M. & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Southern R. Co. v. Pace*, 114 Ga. 712, 40 S. E. 723; *Spaulding v. Chicago & N. Ry. Co.*, 33 Wis. 582, 591. As was well said by the court in this latter case, pages 591, 592: "But the learned counsel for the plaintiff very ingeniously argue that the presumption that the defendant's locomotives were not properly constructed and equipped (which, it was held on the former appeal, arises in a case where the fires complained of are communicated from them) has the force and effect of testimony in the case, and that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose is necessarily a question of fact to be determined by the jury. The argument would probably be a sound one, were this a presumption of fact. Its weight and force, and consequently the amount of proof essential to overcome it, would in such case be for the jury, and not for the court to determine. But the presumption under consideration is clearly one of law, and is governed by an entirely different rule. Its weight and effect, and the amount and character of the proof necessary to overcome it, are questions for the court, and were determined by this court on the former appeal. In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but where, as in this case, there is no such conflict, and the testimony is clear and satisfactory against the presumption it is the duty of the court to hold, as matter of law, that the presumption is overcome. If instead of doing so, the court leaves it to the jury to determine the fact, it is error, within the cases above cited, which will work a reversal of the judgment, if the party against whom it was committed was, or might have been, injured by it."

It is to be noted that in all of the above cases cited the presumption contended for does not amount to evidence, so as to warrant a case to be sent to a jury as upon a conflict of testimony, where there is no other conflict than that which arises between the mere presumption of law, on the one side, and the positive, direct, uncontradicted, and unimpeached testimony on the other; nor is it suggested in any of these cases that testimony of the character suggested above, even when given by employees of the defendant corporation, is so tainted with interest by reason of their employment as that it could be rejected by the jury, if it be fair, reasonable, and consistent in and of itself. We are satisfied that the plaintiff has failed to prove that the defendant was guilty of negligence.

The gist of the declaration is that the defendant was guilty of negligence in maintaining its railroad so near to a pole of the *Naragansett Electric Lighting Company* that such pole was a danger to the plaintiff's intestate, while he was performing his duty as

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conductor, in passing back and forth upon the running board, and that he was ignorant of the danger, and that the defendant neglected to instruct or warn him of this danger. The danger from this pole, if any, was either an obvious risk, and so assumed by the deceased, or else it was nonobvious, or extraordinary, and, if so, it was a matter as to which the deceased was entitled to special warning and instruction from the defendant. And of course it is well settled that in the latter case the burden of proof is upon the defendant to show that proper warning and instruction was given.

The defendant has chosen to take the latter view, viz., that the proximity of this pole was a nonobvious, or extraordinary, risk, and so has put in evidence, and apparently all the evidence in its possession, to show that proper warning and instruction was given by the witness George L. Phillips, who had charge of the deceased on the day previous to the accident, in "breaking him in," for three trips over this route, and who testified positively and directly that he did warn the deceased as to the danger from the very pole at which the accident occurred during the time the witness was so instructing the deceased. This evidence was not contradicted or denied, nor was the witness impeached; nor is there anything, either in the testimony of this witness, or in the facts and circumstances as described by other witnesses, to throw any doubt upon the truth of this testimony. Nor do we think that the witness was so interested, by reason of his employment by the defendant, as to entitle the jury to reject or disregard his testimony. On the contrary, we think the defendant has fully sustained the burden of proof required of it in this matter, and that the jury were not warranted in finding for the plaintiff upon this ground.

But the plaintiff claims, that, inasmuch as the only other witness, the deceased, who knew exactly what instruction and warning was given him, is dead, the plaintiff is entitled to the benefit of a presumption, similar to the one already discussed, that the deceased would not voluntarily expose himself to a known danger, and that the instinct of self-preservation would have made him avoid it, if he knew of it, and therefore that as between this presumption and the testimony of Phillips there arises a conflict in the nature of a direct conflict of testimony as between opposing witnesses; that such conflict was and should have been submitted to the jury; that the jury was entitled to weigh the testimony, and to reject the testimony of Phillips, if they saw fit; and that, having done so, the verdict cannot be disturbed. We have already discussed the question of the effect and weight of such presumption as against direct, positive, uncontradicted, and unimpeached testimony in considering the question of contributory negligence, and we are of the opinion that the presumption here contended for is of no more weight than there, and is a mere presumption of law which does not arise where there is evidence to the contrary. See cases cited *supra*.

The attack by the plaintiff upon the testimony of the witness

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Phillips is entirely unwarranted. He was the only person alive who knew the facts. It was necessary for the defendant to call him, as it was bound to sustain the burden of proof as to the warning and instruction given. His testimony is reasonable and consistent throughout, and is unshaken upon cross-examination, is entirely uncontradicted and unimpeached, and the jury were not warranted in disregarding it, as they must have done. The mere fact that this witness was an employee of the defendant does not, in our opinion, show sufficient interest to entitle the jury to disregard this testimony. See *Kentucky Central R. R. Co. v. Talbot*, 78 Ky. 621, 623, where the court, speaking of such testimony says on pages 623, 624: "It appears to us that the only safe and just rule in a case arising under this statute is that the railroad company should be required, when in its power, to introduce as witnesses those employees who, from the circumstances of the particular case, would be presumed to know whether there had been any negligence on the part of the company; and when unimpeached such witness or witnesses testify that there was no negligence, and the circumstances do not contradict them, the law is for the defendant. To hold otherwise would work manifest injustice and oppression, and would be a discrimination against one class of persons in favor of another whose rights of property are no more sacred. In this case appellant could have done no more than was done. Every employee who could be presumed to know anything in reference to the matter was introduced, and testified in effect that there was no negligence. So far as this record shows, the witnesses are all unimpeached and unimpeachable, and there are no circumstances in the case tending to contradict the statement of these witnesses, as to the absence of negligence," and cases cited following the above are to the same effect. It should also be noted that the pole in this case was not erected by the defendant, and was not in its control; and the case is almost identical with the case of *Hall v. Wakefield Ry. Co.*, 178 Mass. 98, 59 N. E. 668, the only difference being that in the case at bar the evidence showed that the deceased was instructed as to the particular danger; while in the Hall Case the conductor's knowledge of the danger was inferred from the length of service and opportunity for observation. In view of the foregoing we do not consider it necessary to pass upon the question of the damages.

As to the exceptions. In view of the foregoing, from which it appears that the plaintiff has failed to prove either due care on the part of the plaintiff's intestate or negligence on the part of the defendant, it seems unnecessary to discuss in minute detail the numerous exceptions relating to the admission and exclusion of testimony, except so far as it appears that such exceptions must be sustained. The most of the testimony admitted or excluded, noted in the exceptions, was either properly admitted or excluded, or the rulings in either event were harmless to the defendant; and these exceptions are overruled, except as shown below: The testimony excepted to on pages 29, 30, and 34 of

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the record relating to the speed of the car at the time of the accident was immaterial and irrelevant, because the declaration now here makes speed an element of the defendant's negligence. It shed light upon the case only in relation to the contributory negligence of the deceased, as hereinbefore shown, and, so far as it went, was in favor of the defendant; but in the way in which it was offered and ruled in it was likely to lead to confusion in the minds of the jury as it evidently confused the minds of the court and the counsel in the cause as to the proper application of the rules of law to the question of the defendant's negligence, and therefore these exceptions are sustained.

4. The court denied various requests made by the defendant to charge the jury as follows: "(1) If the jury find that the testimony of the witness Phillips, offered by the defendant, has not been refuted by any other testimony, and has not in any way been impeached, and his veracity has not been questioned by any testimony, and that his reputation for veracity has not been impeached by any testimony, the jury must accept his testimony as the sole and controlling evidence in the matters concerning which he testified. (2) If the jury find that the testimony of the witness Phillips, offered by the defendant, has not in any way been refuted, contradicted, or impeached by any testimony, that testimony must stand as controlling evidence upon the issue raised by such testimony, and the verdict of the jury must be for the defendant thereon." "(4) If the jury find that the deceased conductor, William H. Savage, was notified and warned of the danger incident to his employment as conductor upon the defendant's road, in the manner described by the witness Phillips in his testimony offered by the defendant, the verdict must be for the defendant. (5) If the testimony of the witness Phillips, offered by the defendant, relative to the notice of warning to the deceased conductor, William H. Savage, concerning the danger to be apprehended from the pole in question in this case, has not been refuted, contradicted, or impeached by his own or by any other testimony, the jury must accept that testimony as the controlling testimony upon that issue, and the verdict must be for the defendant." The court refused to charge the jury as requested, on the ground (Rec. p. 169) that they had already been substantially so charged. We do not so find upon careful examination of the whole charge. We do find, however, that the court used this language on page 165: "Now, did he have notice? If he had notice, gentlemen, the company is not liable in this case, if they have proved it by a preponderance of evidence. On the one hand, you have got the testimony of this conductor. He says that he actually gave that notice. On the other hand, you have—the conductor is dead. He cannot testify. It comes down to that point, largely, to the question of the credibility of this conductor Phillips." By this language, in our opinion, used in connection with the discussion of the credibility of the testimony of the witness Phillips, the court gave the jury an erroneous idea as to the weight of Phillips's testimony, and practically

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authorized them to ignore it, if they saw fit. The special requests preferred by the defendant were, in our opinion, correct, and should have been given, and if given would have tended to clear up in the minds of the jury any misapprehension they might have had on this point. We think the court below erred, therefore, in denying these requests, on the ground that they had been substantially given before, and that jury were misled, by the instructions actually given, into ignoring the testimony of the witness Phillips, rather than led to give it its proper weight in the consideration of the case. These exceptions are therefore sustained.

The court also denied the following request, made by the defendant: "(7) The burden is upon the plaintiff, was at first and never shifted to the defendant, to prove by a preponderance of evidence that the deceased conductor, William H. Savage, was ignorant of the danger from this pole." There was testimony from which the jury could have found that the danger from this pole was a nonobvious and extraordinary risk, as to which the burden of proof of notice would plainly rest upon the defendant; and we think the jury had already been sufficiently and properly instructed upon this point. The above instruction was properly refused, and the exception to such refusal is overruled.

Upon the whole case, therefore, the exceptions of the defendant are sustained (except as noted above), and the case is remitted to the superior court for a new trial.

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A. AFFIRMATIVE DOCTRINE.

1. General Statement of Doctrine.

In some jurisdictions it is held that the law presumes, in the entire absence of evidence as to the circumstances of the accident, that a person killed by the alleged negligence of another was exercising due care for his own safety at the time he was killed.

United States.—*Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. Rep. 1104.

California.—*Gay v. Winter*, 34 Cal. 153.

Delaware.—*Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.) 123, 42 Atl. 442.

Michigan.—*Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 41 Am. & Eng. R. Cas. 414; *Powers v. Pere Marquette R. Co.* (Mich.), 20 R. R. R. 559, 43 Am. & Eng. R. Cas., N. S., 559, 106 N. W. 1117.

Missouri.—*Buesching v. St. Louis Gaslight Co.*, 73 Mo. 220, 39 Am. Rep. 503; *Eckhard v. St. Louis Transit Co.* (Mo.), 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831, 89 S. W. 602; *Flynn v. Kansas City, etc., R. Co.*, 78 Mo. 195, 18 Am. & Eng. R. Cas. 23; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775, 89 S. W. 865.

North Carolina.—*Cogdell v. Wilmington & W. R. Co.* (N. Car.), 8 R. R. R. 487, 31 Am. & Eng. R. Cas., N. S., 487, 44 S. E. 618; *Stewart v. Raleigh, etc., R. Co.* (N. Car.), 53 S. E. 877, 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572.

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North Dakota.—*Cameron v. Great Northern Ry. Co.*, 8 N. Dak. 124, 77 N. W. 1016, 12 Am. & Eng. R. Cas., N. S., 520.

Oregon.—*McBride v. Northern Pac. R. Co.*, 19 Ore. 64, 23 Pac. 814, 42 Am. & Eng. R. Cas. 146.

Pennsylvania.—*Cleveland & Pittsburg R. Co. v. Rowan*, 66 Pa. St. 393; *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8.

Virginia.—*Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *Southern R. Co. v. Bryant*, 95 Va. 212, 28 S. E. 183.

2. Other Statements, and Illustrations and Limitations, of Doctrine.

Negligence Affirmatively Shown—Absence of Evidence of Conduct of Deceased.—In an action to recover for the alleged negligent killing of plaintiff's intestate, where the negligence of defendant is affirmatively shown, and there is no proof of the conduct of deceased, the jury are at liberty to infer ordinary care and diligence on his part, taking into consideration his character and habits and the natural instinct of self-preservation. So held in *Gay v. Winter*, 34 Cal. 153.

Railroad Accident.—In deference to the instinct of self-preservation, where there was no eye witness of an accident resulting in the death, it will be presumed that a person killed in a railroad accident was in the exercise of due care at the time, until the contrary is made to appear by evidence. So held in *Cameron v. Great Northern Ry. Co.*, 8 N. Dak. 124, 77 N. W. 1016, 12 Am. & Eng. R. Cas., N. S., 520.

Death of Minor Son—Action by Father.—In an action by a father to recover for the negligent killing of his minor son, it will be presumed that deceased was, at the time of the accident, in the exercise of ordinary care and prudence. So held in *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286, 6 S. W. 464.

Effect of Evidence Tending to Rebut Presumption.—In a case where plaintiff is held to be entitled to the benefit of a presumption that his intestate was in the exercise of the care of a person of ordinary prudence when killed, if evidence be adduced by defendant tending to rebut this presumption, the burden still rests on plaintiff to satisfy the jury by a preponderance of the evidence that deceased was in the exercise of due care. So held in *Judge v. Narragansett Elec. Light Co.*, 21 R. I. 128, 42 Atl. 507.

Negligence on Part of either Party Not Presumed.—In an action against a railroad company for the death of a person killed on its track by a train, plaintiff asked the court to instruct that "the law presumes that the person found killed by the negligence of another exercised due care himself." This the court gave, and added: "Likewise the law presumes that a person such as an engineer does his duty. In fact, as a rule, the law does not presume negligence, and it requires a person who charges a breach of duty or negligence to prove it." It was held that this modification or addition was proper. *Stewart v. North Carolina R. Co. (N. Car.)*, 48 S. E. 793, 16 R. R. R. 212, 39 Am. & Eng. R. Cas., N. S., 212.

Presumption and Inference Not Synonymous—Instruction.—In an action for the negligent death of a servant, it was error to refuse a requested charge that the law "presumes" that a person found dead

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and killed by the alleged negligence of another has exercised due care himself, and to substitute therefor a charge that an "inference arises from the instinct of self-preservation" that the person killed has exercised due care himself; the words presumption and "inference" not having the same significance. So held in *Cogdell v. Wilmington & W. R. Co. (N. Car.)*, 8 R. R. R. 487, 31 Am. & Eng. R. Cas., N. S., 487, 44 S. E. 618.

3. Railroad Crossings—Presumption That Deceased Stopped, Looked and Listened.

Where such doctrine prevails, it is presumed, in an action to recover for his death, where there is no direct testimony as to how the accident happened, that a person killed by a train at a crossing took the precautions required by law to discover whether a train was approaching, before he attempted to cross the track, and was not guilty of contributory negligence in making such attempt.

Delaware.—*Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.), 123, 42 Atl. 442.

Kansas.—*Chicago, R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993.

Missouri.—*Eckhard v. St. Louis Transit Co. (Mo.)*, 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831, 89 S. W. 602.

New Hampshire.—*Huntress v. Boston & Maine R. R.*, 66 N. H. 185, 34 Atl. 154.

Oregon.—*McBride v. Northern Pac. R. Co.*, 19 Ore. 64, 23 Pac. 814, 42 Am. & Eng. R. Cas. 146.

Pennsylvania.—*Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; *Reading & Columbia R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8.

Virginia.—*Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901.

Entire Absence of Evidence.—The law presumes, in the entire absence of evidence, that a railroad employee, killed while crossing the track of his railroad on foot at night, exercised proper care in looking and listening for approaching trains before attempting to cross the track. So held in *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. Rep. 1104.

Burden on Defendant.—In *Southern R. Co. v. Bryant*, 95 Va. 212, 23 S. E. 183, an action for alleged negligence in running a train against plaintiff's decedent at a highway crossing, it is said in the opinion: "If the defendant railway company relied upon contributory negligence on the part of deceased to defeat a recovery by the plaintiff, it is well settled in this State, whatever may be the decisions elsewhere, that the burden was on the company to prove it, unless such negligence was disclosed by the evidence of the plaintiff, or might be fairly inferred from all the circumstances; and, in the absence of such proof, the person injured must be presumed to have been without fault. *Balto. & Ohio R. Co. v. Whittington*, 30 Gratt. 805; *Balto. & O. R. Co. v. McKensie*, 81 Va. 71, 24 Am. & Eng. R. Cas. 395; *Southwest Imp. Co. v. Andrew*, 86 Va. 273, 9 S. E. 1015; N.

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& W. R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475, and Kimball & Fink *v.* Friend, 95 Va. 125, 27 S. E. 901. See also, Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 298; Railroad Co. *v.* Gladmon, 15 Wall. 401; and 2 Woods on Railroads, 1455."

Struck by Street Car.—In *Eckhard v. St. Louis Transit Co.* (Mo.), 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831, 89 S. W. 602, it is held that, in an action for death in a collision between deceased and a street car at a crossing, it would be presumed, in the absence of evidence to the contrary, that deceased looked and listened before attempting to cross in front of the car, and that he was in the exercise of proper care.

Death after Institution of Action.—In an action to recover for injury to person or property, suffered in crossing a railroad, where plaintiff has died since the institution of the action, and been unable to testify for himself, the law will presume that he took the proper precautions to avoid being struck by trains. So held in *Martin v. Baltimore, etc., R. Co.*, 2 Marv. (Del.), 42 Atl. 442.

Killed on Level Highway Crossing—No Evidence as to Deceased's Incapacity.—In an action against a railroad company for the death of a person killed by a train on a level highway crossing, when there is no evidence that the deceased was insane or intoxicated or that he committed suicide, and no direct evidence on the question of his negligence, his exercise of ordinary care may be inferred from the instinct of self-preservation. So held in *Huntress v. Boston & Maine R. R.*, 66 N. H. 185, 34 Atl. 154.

Negligence Proved—Absence of Evidence—Slight Presumption.—In *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901, 903, it is said in the opinion: "Where a traveler is killed at a railroad crossing, and the negligence of the railroad is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. *Railroad Co. v. Gladman*, 15 Wall. 401, 406-7; *Oldfield v. New York & Harlem R. Co.*, 14 N. Y. 310; *Roberts v. Delaware & Hudson Canal, etc.*, 177 Penn. St. 183, 35 Atl. 723; *Balt. and Ohio R. Co. v. Griffith*, 159 U. S. 603, 611, 612. If this were not so the plaintiff would in all such cases have to allege and prove not only the negligence of the railroad company, but his own freedom from contributory negligence. With us this is not the rule, though it is in some jurisdictions."

Crossing Accident—Obstructed View and Hearing—Driver Killed—Affirmative Proof.—In *Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 150, it appeared that a train and a wagon collided at a railroad crossing, at which, owing to a high bank and a curve in the road, the locomotive could not be seen or heard by the driver of the wagon until within ten seconds in time and three hundred feet in distance. The tively, by the evidence of eyewitnesses that the deceased did not action for his death, that plaintiff was not bound to establish affirma-

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tively, by the evidence of eye witnesses that the deceased did not by his negligence contribute to the injury.

4. Where Train's Approach Should Have Been Discovered by Deceased.

But in actions to recover for the death of a person killed by a train at a railroad crossing, where it appears from the evidence that deceased could have discovered that the train was approaching, in time to have avoided being struck by it, had he been in the exercise of care and taken the proper precautions for his own safety before he attempted to cross the track, it is generally held that it is to be presumed he did not take such precautions and was guilty of negligence which contributed to his death.

United States.—*Rollins v. Chicago, etc., Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291, 139 Fed. Rep. 639.

Iowa.—*Dalton v. Chicago, etc., Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460, 86 N. W. 272; *Rietveld v. Wabash R. Co.* (Iowa), 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181, 105 N. W. 515.

Massachusetts.—*Hinckley v. Cape Cod R. Co.*, 120 Mass. 257.

Minnesota.—*Brown v. Milwaukee & St. Paul Ry. Co.*, 22 Minn. 165; *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208, 105 N. W. 555.

Missouri.—*Porter v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 343, 97 S. W. 880.

New York.—*Havens v. Erie Ry. Co.*, 41 N. Y. 296; *Rainey v. New York Cent. & H. R. Co.*, 68 Hun (N. Y.), 495, 23 N. Y. Supp. 80; *Smedis v. Brooklyn & R. B. R. Co.*, 88 N. Y. 13, 8 Am. & Eng. R. Cas. 445; *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 23 Am. & Eng. R. Cas. 313; *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358.

Pennsylvania.—*Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387.

West Virginia.—*McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788.

Possibility of Seeing Train—Undisputed Evidence.—The presumption that a person who was struck and killed by a train while driving over a railroad crossing exercised due care to avoid injury is destroyed, where it appears from the undisputed evidence that, if he had looked and listened before driving upon the crossing, he must have seen and heard the train approaching. So held in *Rollins v. Chicago, etc., Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291, 139 Fed. Rep. 639.

Unobstructed View.—When the vision of the highway traveler is so unobstructed along the track that he can easily discover an approaching train, or the circumstances are such that his sense of hearing, if used, must apprise him of the same fact, in time to escape the train, it will be presumed, in an action for his death from the train, under ordinary circumstances, that he did not look or listen, or, if so, that he heedlessly disregarded the knowledge thus obtained. So held in *Brown v. Milwaukee & St. Paul Ry. Co.*, 22 Minn. 165.

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Moving Train on Main Track—Struck by Detached Car on Side Track—Speed and No Signals.—In *Hinckley v. Cape Cod R. Co.*, 122 Mass. 257, an action against a railroad corporation, by the administrator of a person so injured by being struck by a car, while crossing the railroad, that he died almost immediately, there was evidence that the railroad, running north and south, crossed a highway at grade near the railroad station; that, a short distance north of the highway, a side track branched off and crossed the highway a little easterly of the main track, and led into but not through the station; that the station was south of the highway; that the pathway, used by persons going to the station from the highway on the east side, crossed the side track obliquely, the distance to the platform being one hundred and fifty-seven feet; that at the point where the path left the highway one could see up the track to the north for about one hundred and fifty feet, and from the track itself for half a mile; that the person injured was going to the station to see his daughter off by a train which was then due; that the ground was frozen and slippery; that, as he approached the railroad from the east, a freight train was coming from the north, which kept upon the main track, except a single car, which was switched upon the side track; and that as he was crossing the side track, by the usual path, he was struck by the detached car, which was moving rapidly, and without any signal or warning. It was held that, on this evidence, the jury would not be warranted in finding that the plaintiff's intestate was in the exercise of due care.

Gentle Horse—Possibility of Seeing Train in Ample Time—Nonsuit.—In *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 23 Am. & Eng. R. Cas. 313, it appeared that plaintiff's intestate was killed at a crossing on defendant's road; that the road crossed the track at an acute angle; that there were no obstacles to prevent deceased from seeing an approaching train for more than half a mile from the crossing; that deceased was driving a gentle horse, and the condition of the road was such as to prevent fast driving; that the night was dark and misty, but it appeared by plaintiff's own witnesses that the headlight of the engine could have been seen at a distance much more than sufficient to have given him warning, and, had he been looking, to have enabled him to escape injury. It was held that this evidence was insufficient to make the question of contributory negligence one of fact, and that a refusal to nonsuit was error.

Presumption That Both Husband and Wife Saw Train—Reliance on Husband to Stop Vehicle.—In *Hoag v. New York Cent. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648, it appeared that plaintiff's intestate was riding on a public highway with her husband, who was driving; and that in attempting to cross defendant's tracks at a crossing they were both killed by a collision with a passing train; that at this crossing, in the absence of obstructions, a train upon the freight track, which came first and was seventy feet from the passenger track, was visible for a distance of one or two miles; that, in approaching the freight track, the husband stopped his horse when a hundred or more yards away and then again within fifteen yards of the crossing on account of the

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passage of a freight train; that as soon as it had passed he crossed the freight track, and, in an endeavor to cross the passenger track, the collision occurred; and there was no proof as to the manner of the accident except that the horse was seen jumping to get across and did, in fact, escape. Plaintiff was nonsuited. It was held that was error; that if the husband was negligent, his negligence could not be imputed to the wife; that while she had no right, because her husband was driving, to omit reasonable and prudent efforts to see for herself that the crossing was safe, she was not bound to suspect a purpose on the part of her husband to cross until she saw it being executed; and that the presumption was they both saw the approaching train, and she was not blamable in thinking and expecting he would stop again.

Failure to Stop, Look and Listen—Possibility of Seeing Train.—In *Smedis v. Brooklyn & R. B. R. Co.*, 88 N. Y. 13, an action to recover for alleged negligence causing the death of a traveler by running a train over him at a highway crossing, it is held that while a traveler on a highway, on approaching a railroad crossing, is bound to look and listen for an approaching train before undertaking to cross, it is only where it appears from the evidence that he might have seen the train had he looked, or might have heard it had he listened, that a jury, in the absence of evidence upon the question, is authorized to find that he did not look and did not listen.

Prima Facie Case—Stop, Look and Listen—Absence of Affirmative Proof.—In an action to recover for the death of a person killed by a train at a crossing, where plaintiff made out a prima facie case of negligence without proving affirmatively that deceased “stopped, looked and listened, that a witness of defendant testified that deceased could have seen the train coming if he had looked did not justify the court in instructing the jury to find for defendant. So held in *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387.

Uncontradicted Evidence.—Although from the uncontradicted evidence in the case it might have been inferred that if the person killed at a crossing by a train had stopped and looked and listened he would have seen the approaching train in time, it is for the jury to determine the fact. So held in *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157.

B. WHERE DIRECT EVIDENCE OF CIRCUMSTANCES OF ACCIDENT.

1. General Rule.

But where there is direct evidence as to the circumstances under which deceased lost his life, no presumption of freedom from contributory negligence on his part exists, even in jurisdictions where the doctrine creating the presumption meets with the most unlimited approval.

United States.—*Los Angeles Traction Co. v. Conneally* (C. C. A.), 16 R. R. R. 107, 39 Am. & Eng. R. Cas., N. S., 107, 136 Fed. Rep. 104, 34 U. S. 107; *St. Louis & S. F. R. Co. v. Whittle* (C. C. A.), 74 Fed. Rep. 296

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Illinois.—*Illinois Cent. R. Co. v. Kief*, 111 Ill. App. 354.

Iowa.—*Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 328, 60 N. W. 653.

Pennsylvania.—*Reading & Columbia R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

Rhode Island.—*Judge v. Narragansett Elec. Light Co.*, 21 R. I. 128, 42 Atl. 507.

Washington.—*Woolf v. Washington Ry. & Nav. Co. (Wash.)*, 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846, 79 Pac. 997.

2. Other Statements, and Illustrations, of Rule.

Where eye witnesses have testified to the facts and circumstances surrounding the accident which caused the death of the plaintiff's intestate, the rule which entitles the jury to consider the instinct of self-preservation and the presumption which may arise from proof of the habitual exercise of due care, does not apply. So held in *Illinois Cent. R. Co. v. Kief*, 111 Ill. App. 354.

Crossing Accident—Look and Listen—Possibility of Seeing and Hearing Train.—The presumption that one who was killed while crossing a railway track looked and listened before attempting to cross it is destroyed where the plaintiff introduces direct and affirmative evidence as to exactly what occurred, and where it also appears from the undisputed evidence, that if the deceased had looked and listened before going upon the crossing he must have seen and heard the train approaching. So held in *Carlson v. Chicago & N. W. Ry. Co. (Minn.)*, 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208, 105 N. W. 555.

Inference of Contributory Negligence—Absence of Rebutting Evidence.—In the absence of evidence to rebut an inference of want of due care deducible from the facts of a case, the jury is not warranted in finding plaintiff's intestate was not guilty of contributory negligence, as in such case plaintiff is not entitled to the benefit of the presumption that deceased was in exercise of the care of a person of ordinary prudence. So held in *Judge v. Narragansett Elec. Light Co.*, 21 R. I. 128, 42 Atl. 507.

Failure to Wait for Train to Back to Station—Passenger Killed at Night by Backing Train.—In *St. Louis & S. F. R. Co. v. Whittle (C. C. A.)*, 74 Fed. Rep. 296, it is held that the fact that an intending passenger went up the railroad track, and walked or ran towards the train he intended to board, without waiting to ascertain whether it would back down to the station, on a dark night, when he could not see the train, and had at least as much reason to suppose it would move back as forward, showed that he was guilty of contributory negligence, a conclusion not affected by the presumption arising from the instinct of self-preservation. In this case it is said in the opinion: "It has been suggested, arguendo, that the fact that all men possess the natural instinct of self-preservation constituted in itself some evidence which warranted the jury in finding that Whittle (deceased) exercised due care, and so the case was properly submitted to the jury. The answer to this suggestion is that the testimony in this case discloses

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what the deceased did on the occasion of the accident. It shows that he committed an unnecessary and negligent act, without which the accident would not have occurred."

Crossing Accident—Collision between Street Car and Cart—That Deceased Saw Car Indicated by Circumstance.—In an action for death caused by a collision with a street car at a crossing, there was evidence that the horse deceased was driving approached the crossing at a gallop, whereupon the motorman immediately applied the brakes and did everything in his power to stop the car, and so far succeeded that deceased almost got across the track before the cart was struck. Immediately after the collision the horse appeared to be sweaty, but stood quietly with two of his feet on the curbing of the sidewalk. The cart, when struck, was in a position indicating that deceased saw the car and took a diagonal course to cross ahead of it. It was held that such facts justified a finding that deceased was guilty of contributory negligence, so that it was error to charge that, in the absence of all evidence tending to show whether deceased stopped, looked and listened before attempting to cross, it would be presumed that he did. *Los Angeles Traction Co. v. Conneally* (C. C. A.), 16 R. R. R. 107, 39 Am. & Eng. R. Cas., N. S., 107, 136 Fed. Rep. 104.

C. CONTRIBUTORY NEGLIGENCE—APPLICATION OF RULE THROWING BURDEN OF PROOF UPON DEFENDANT.

1. In General.

Some authorities apply the rule that defendants must prove that plaintiff contributed to his injury, unless plaintiff's evidence discloses contributory negligence, in actions for wrongful death, so as to throw the burden on defendant of establishing that plaintiff's decedent was not in the exercise of due care for his own safety when the accident occurred.

Alabama.—*Mobile, etc., R. Co. v. Bromberg* (Ala.), 37 So. 395.

California.—*MacDougall v. Central R. Co.*, 63 Cal. 431, 12 Am. & Eng. R. Cas. 143; *Schneider v. Market Street Ry. Co.*, 134 Cal. 482, 66 Pac. 734.

North Carolina.—*Purnell v. Raleigh & G. R. Co.*, 122 N. Car. 832, 29 S. E. 953; *Stewart v. Raleigh, etc., R. Co.* (N. Car.), 53 S. E. 877, 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572.

Pennsylvania.—*Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; *Philadelphia & Trenton R. Co. v. Hagan*, 47 Pa. St. 244.

Texas.—*Gulf, etc., Ry. Co. v. Finley*, 11 Tex. Civ. App. 64, 32 S. W. 51; *Texas & P. Ry. Co. v. Huber* (Tex. Civ. App.), 95 S. W. 568.

Virginia.—*Balto. & Ohio R. Co. v. Whittington*, 30 Gratt. (Va.), 805; *Southwest Imp. Co. v. Andrew*, 86 Va. 273, 9 S. E. 1015; *N. & W. R. Co. v. Gilman*, 88 Va. 239, 13 S. E. 475; *Southern R. Co. v. Bryant*, 95 Va. 212, 28 S. E. 183.

2. Illustrations.

In an action to recover for the killing of a person at a crossing by a train, the burden is on the defendant railroad to disprove the exercise of care for his own safety by deceased, unless plaintiff's own ev-

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idence shows contributory negligence. So held in *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157.

Crossing Accident—Burden upon Defendant.—In *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901, 903, it is said in the opinion: "The burden of showing that deceased was not in the exercise of ordinary care in approaching the crossing was upon the defendants, unless it was disclosed by the plaintiff's evidence, or can be fairly inferred from all the circumstances of the case. *Balto. & Ohio R. Co. v. Whittington*, 30 Gratt. 805; *Southwest Imp. Co. v. Andrew*, 86 Va. 273, 9 S. E. 1015; *N. & W. R. Co. v. Gilman*, 88 Va. 239, 13 S. E. 475.

Burden of Rebutting Presumption.—Where a railroad engineer was killed in a collision, the burden was on the defendant railroad company, his employer, to remove the presumption that deceased exercised due care for his own safety. So held in *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 53 S. E. 877, 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572.

Crossing Accident—Absence of Signals and Affirmative Proof of Contributory Negligence.—In *Philadelphia & Trenton R. Co. v. Hagan*, 47 Pa. St. 244, an action to recover for the death of one killed by a train at a street crossing, it was held not error to instruct the jury that, if the whistle of the engine was not sounded nor any other usual notice given of the approach of the train, deceased had a right to presume that the track was clear; and unless the jury were satisfied, by affirmative proof, that deceased did not use ordinary care, defendants were liable for the death.

Burden of Disproving Not on Plaintiff.—In an action for death by negligence, it is not necessary, in the first place, to disprove contributory negligence in the deceased. So held in *Cleveland & Pittsburg R. Co. v. Rowan*, 66 Pa. St. 393.

Absence of Contributory Negligence—Affirmative Proof Not Required.—In an action to recover for the death of plaintiff's decedent, the burden is on plaintiff to show that defendant's negligence caused the death without contributory negligence on the part of deceased, but plaintiff need not prove affirmatively that there was no contributory negligence; and if plaintiff does not show that there was, and such negligence is alleged by defendant, the burden is on the latter. So held in *Pennsylvania Tel. Co. v. Varnan (Pa.)*, 15 Atl. 624.

D. INSTINCT OF SELF-PRESERVATION MUST BE CONSIDERED BY JURY.

1. General Rule.

It is generally held, even in jurisdictions where there is no presumption of the exercise of due care, that the jury, in determining from circumstantial evidence whether deceased was in the exercise of due care when killed, must give some weight to the instincts which naturally lead men to avoid injury and preserve their own lives.

California.—*Gay v. Winter*, 34 Cal. 153.

Illinois.—*Broadbent v. Chicago & Grand Trunk Ry. Co.*, 44 Ill. App. 231; *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

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Iowa.—*Way v. Illinois Cent. R. Co.*, 40 Ill. 341; *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 328, 60 N. W. 653.

Maryland.—*Northern Cent. Ry. Co. v. State*, 31 Md. 357; *Northern Cent. Ry. Co. v. State*, 29 Md. 420; *Tucker v. State*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004.

Missouri.—*Flynn v. Kansas City, etc., R. Co.*, 78 Mo. 195, 18 Am. & Eng. R. Cas. 23.

New Hampshire.—*Huntress v. Boston & Maine R. R.*, 66 N. H. 185, 34 Atl. 154; *Miller v. Boston & Maine R. R. (N. H.)*, 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564, 61 Atl. 360.

New York.—*Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Morrison v. New York Cent. & H. R. R. Co.*, 63 N. Y. 643.

North Dakota.—*Cameron v. Great Northern Ry. Co.*, 8 N. Dak. 124, 77 N. W. 1016, 12 Am. & Eng. R. Cas., N. S., 520.

Pennsylvania.—*Allen v. Willard*, 57 Pa. St. 374; *Cleveland v. Pittsburgh R. Co. v. Rowan*, 66 Pa. St. 393.

2. Illustrations.

In an action for the death of plaintiff's intestate, alleged to have been killed through the negligence of defendant, in determining whether ordinary care was exercised by deceased, the jury should give due weight to the instincts and presumptions which naturally lead men to avoid injury, and preserve their own lives. So held in *Way v. Illinois Cent. R. Co.*, 40 Ill. 341.

When Evidence Is Conflicting.—Where the evidence is conflicting as to whether a person killed through the alleged fault of another contributed by negligence to his own injury, the jury may, in connection with all the facts and circumstances of the case, infer the absence of fault from the known disposition of men to avoid injury to themselves. So held in *Northern Cent. Ry. Co. v. State*, 31 Md. 357.

Instinct of Self-Preservation as Element of Evidence.—There is in all men a natural instinct of self-preservation, and such instinct is an element of evidence in cases of personal injuries founded upon the negligence of defendant, of which the jury may take notice, and, in the absence of all testimony upon the subject, find that a deceased party, in obedience to such instinct, exercised that care for his safety which a prudent man would have made use of under the same conditions. So held in *Broadbent v. Chicago & Grand Trunk Ry. Co.*, 44 Ill. App. 231.

Absence of Contributory Negligence—Circumstantial Evidence—Assumption Considered in Weighing.—In an action to recover for alleged negligence causing the death of plaintiff's intestate, the absence of contributory negligence may be made to appear as well from the circumstances of the case as from evidence directly establishing the fact. And in weighing those circumstances it may be assumed that all creatures are desirous of preserving their lives and keeping their bodies from harm. So held in *Morrison v. New York Cent. & H. R. R. Co.*, 63 N. Y. 643.

Absence of Street Car Lights or Bells—Sewer Construction—Street Obstructed—Sober Cartman Found Dead on Track.—In *Johnson v.*

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Hudson River R. Co., 20 N. Y. 65, it appeared that a horse car was proceeding without lights or bells on a dark evening in a street of New York city, obstructed by a sewer in the process of construction; that plaintiff, a sober cartman, was found dead upon the railway track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his cart when struck by defendant's car. And there was no witness to the accident. It was held that the dangerous tendency of defendant's conduct was such as, in the absence of any other evidence, that the presumption that the deceased had the same regard for his safety as other men authorized the attributing of the accident to the negligence of the defendant, and the refusal of a nonsuit.

E. ABSENCE OF CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF ON PLAINTIFF.

1. Statement of Doctrine.

In other jurisdictions, the rule is that plaintiff must prove, either by direct testimony or circumstantial evidence, that his decedent, alleged to have been killed through the negligence of defendant, was exercising proper care for his own safety at the time of the accident.

Connecticut.—*Ryan v. Town of Bristol*, 63 Conn. 26, 27 Atl. 309.

Georgia.—*Prather v. Richmond & D. R. Co.*, 80 Ga. 427, 9 S. E. 530.

Illinois.—*Chicago & N. W. Ry. Co. v. Coss*, 73 Ill. 394; *Chicago, B. & Z. R. Co. v. Gregory*, 58 Ill. 272; *Chicago, etc., R. Co. v. Gunderson*, 74 Ill. App. 356; *Chicago, M. & St. P. Ry. Co. v. O'Sullivan*, 143 Ill. 48, 32 N. E. 398; *Chicago & A. Ry. Co. v. Adler*, 129 Ill. 335, 21 N. E. 846, 39 Am. & Eng. R. Cas. 666; *Chicago North Shore Ry. Co. v. Green*, 93 Ill. App. 105; *Illinois Cent. R. Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011; *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Way v. Illinois Cent. R. Co.*, 40 Ill. 341.

Indiana.—*Evansville St. R. Co. v. Gentry (Ind.)*, 5 Am. & Eng. R. Cas., N. S., 500; *Indiana, etc., Ry. Co. v. Greene*, 106 Ind. 279, 6 N. E. 603, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736; *Toledo, etc., Ry. Co. v. Brannagan*, 75 Ind. 490, 5 Am. & Eng. R. Cas. 630.

Iowa.—*Danaldson v. Mississippi & M. R. Co.*, 18 Iowa 280; *Coats v. Burlington, etc., Ry. Co.*, 62 Iowa 486, 17 N. W. 760, 15 Am. & Eng. R. Cas. 265; *Gorman v. Minneapolis & St. L. Ry. Co.*, 78 Iowa 509, 43 N. W. 303; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14; *Murphy v. C. R. I. & P. R. Co.*, 45 Iowa 661; *Patterson v. Burlington B. & M. R. Co.*, 38 Iowa 279; *Rietveld v. Wabash R. Co. (Iowa)*, 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181, 105 N. W. 515.

Maine.—*Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 106; *Day v. Boston & M. R. R. (Me.)*, 6 R. R. R. 626, 29 Am. & Eng. R. Cas., N. S., 626; *McDonough v. Grand Trunk Ry. Co.*, 98 Me. 304, 56 Atl. 913; *State v. Maine Cent. R. Co.*, 77 Me. 538, 1 Atl. 673.

Massachusetts.—*Adams v. Boston & N. St. Ry. Co. (Mass.)*, 78 N. E. 117, 21 R. R. R. 70, 44 Am. & Eng. R. Cas., N. S., 70; *Cox v. South Shore & B. St. Ry. Co.*, 6 R. R. R. 641, 29 Am. & Eng. R. Cas. 461, 65 N. E. 823; *Riley v. Connecticut River R. R.*, 135 Mass.

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292, 15 Am. & Eng. R. Cas. 181; *Shea v. Boston & Maine R. R.*, 154 Mass. 31, 27 N. E. 672; *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655, 53 Am. & Eng. R. Cas. 467; *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453.

New York.—*Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128; *Caven v. City of Troy* (N. Y. Sup. Ct.), 52 N. Y. Supp. 804; *Chisholm v. State*, 141 N. Y. 246, 36 N. E. 184; *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330; *Dorr v. McCullough* (N. Y. Sup. Ct.), 40 N. Y. Supp. 806; *Fejouski v. Delaware & H. Canal Co.* (N. Y. Sup. Ct.), 43 N. Y. Supp. 84; *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Kane v. Whitaker* (N. Y. Sup. Ct.), 54 N. Y. Supp. 85; *Krauss v. Wallkill Val. R. Co.* (N. Y. Sup. Ct.), 23 N. Y. Supp. 432, 69 Hun 482; *Mitchell v. New York Cent. & H. R. R. Co.*, 64 N. Y. 655; *O'Neil v. Hudson Valley Ice Co.*, 74 Hun (N. Y.) 163, 26 N. Y. Supp. 598; *Riceman v. Havemayer*, 84 N. Y. 646; *Riordan v. Ocean Steamship Co.*, 124 N. Y. 655, 26 N. E. 1027; *Schafer v. City of New York* (N. Y. Sup. Ct.), 42 N. Y. Supp. 744; *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 23 Am. & Eng. R. Cas. 313; *Wall v. Delaware, L. & W. R. Co.*, 54 Hun (N. Y.) 454; *Wiwirowski v. Lake Shore & M. S. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023; *Weston v. Troy*, 139 N. Y. 281, 34 N. E. 780.

Rhode Island.—*Judge v. Narragansett Elec. Light Co.*, 21 R. I. 123, 42 Atl. 507.

2. Other Statements, Illustrations and Limitations, of Doctrine.

In an action for causing the death of plaintiff's intestate, the burden is upon plaintiff to show that deceased exercised ordinary care to avoid the injury. So held in *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

In an action by an administrator against a railroad company for causing the death of a person, the plaintiff must prove that decedent was not guilty of negligence contributory to his death. So held in *Murphy v. C. R. & P. R. Co.*, 45 Iowa 661.

In an action against a railroad company for causing the death of a person by its negligence, the plaintiff must show affirmatively that the decedent was not guilty of negligence contributory to his death. So held in *Patterson v. Burlington & M. R. Co.*, 38 Iowa 279.

Accident at Crossing.—In an action against a railroad company to recover for causing the death of plaintiff's intestate at a railroad crossing, it must be affirmatively shown, either directly or circumstantially, that the deceased was free from contributory negligence, to entitle him to recover. So held in *Indiana, etc., Ry. Co. v. Greene*, 106 Ind. 279, 6 N. E. 603, 25 Am. & Eng. R. Cas. 322, 55 Am. Rep. 736.

Crossing Accident—Burden Not on Defendant.—In an action for the death of one killed by a train at a railroad crossing, the burden is not on defendant to show that deceased was guilty of contributory negligence. So held in *Rietveld v. Wabash R. Co.* (Iowa), 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181, 105 N. W. 515.

Evidence Balanced—Nonsuit.—In an action to recover for alleged negligence causing death, freedom from contributory negligence must be proved, and where the circumstances point as much to the negli-

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gence of deceased as to its absence, or point in neither direction, a refusal to nonsuit is error. So held in *Wiwirowski v. Lake Shore & M. S. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023.

Total Failure to Show Exercise of Due Care by Deceased.—In an action for the death of plaintiff's intestate through the alleged negligence of defendant, if the evidence wholly fails to show that deceased was using due care, there can be no recovery. So held in *Riley v. Connecticut River R. R.*, 135 Mass. 292, 15 Am. & Eng. R. Cas. 181.

An action to recover for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant cannot be maintained when the plaintiff wholly fails to show affirmatively, either by direct evidence, or by legitimate inference from any evidence in the case, that the intestate was in the exercise of due care, and did not negligently contribute to the injury. And absence of such proof is alone fatal to plaintiff's action. So held in *Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 106.

Burden of Proof on Plaintiff.—In an action to recover for alleged negligence causing the death of plaintiff's intestate, upon the question of contributory negligence, the court charged: "It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may with equal fairness be drawn, but the burden is upon plaintiff to satisfy you that there was no contributory negligence on the part of deceased." This was held no error. *Hart v. Hudson River Bridge Co.*, 84 N. Y. 56.

Absence or Presence of Contributory Negligence—Evidence Balanced—Nonsuit.—A nonsuit, granted on the ground that plaintiff did not show freedom from contributory negligence on the part of his intestate, alleged to have been killed through the negligence of defendant, will not be disturbed, though the circumstances point as much to absence of contributory negligence as to its presence. So held in *Dorr v. McCullough* (N. Y. Sup. Ct.), 40 N. Y. Supp. 806.

Absence of Contributory Negligence—Verdict Founded upon Mere Conjecture.—A verdict, in an action for negligently causing the death of plaintiff's decedent, founded upon mere conjecture as to the absence of contributory negligence on the part of deceased, cannot be sustained. So held in *Caven v. City of Troy* (N. Y. Sup. Ct.), 52 N. Y. Supp. 804.

Entire Absence of Evidence of Deceased's Conduct—One Conjecture More Probable than Another.—If all the circumstances attending an accident are in evidence, the mere absence of evidence of fault on the part of the person killed may justify an inference of due care on his part; but where there is an entire absence of evidence as to what the person killed was doing at the time of the accident, it is not enough to show that one conjecture is more probable than another in order that his administrator and next of kin may recover. There must be some evidence to show that he was in the exercise of due care. So held in *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655, 53 Am. & Eng. R. Cas. 467.

Evidence as Consistent with Deceased's Carelessness as with His Carefulness.—Where, in an action under Mass. St. 1887, c. 270, § 2,

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for causing the death of an employee, the evidence introduced is as consistent with carelessness on his part as with his exercise of due care, the plaintiff does not sustain the burden of proof, under § 1, that the deceased was in the exercise of due care and diligence at the time he was killed, and the action cannot be maintained. So held in *Shea v. Boston & Maine R. R.*, 154 Mass. 31, 27 N. E. 672.

Evidence Must Raise Inference of Absence of Contributory Negligence.—In *Kane v. Whitaker* (N. Y. Sup. Ct.), 54 N. Y. Supp. 85, it is held that, in an action for alleged negligence causing the death of plaintiff's intestate, plaintiff must, at least, produce evidence from which the inference of the freedom of deceased from contributory negligence can be drawn.

Where Circumstances Do Not Tend to Prove Existence of Cause of Accident Compatible with Absence of Contributory Negligence.—In *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 23 Am. & Eng. R. Cas. 313, it is held that, in an action for negligence causing death, the burden of establishing affirmatively freedom from contributory negligence is upon the plaintiff; and while, although there were no eyewitnesses of the accident, and although its precise cause and manner of occurrence are unknown, absence of contributory negligence may be established, sufficiently to make it a question of fact for the jury, by proof of such facts and surrounding circumstances as reasonably indicate or tend to establish that the accident might have occurred without negligence on the part of deceased, yet if the facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion therefor which is consistent with proper care and prudence, the inference of negligence is the only one to be drawn, and defendant is entitled to a nonsuit.

Crossing Accident—Absence of Contributory Negligence—Slighter Evidence Required.—In *Rodrian v. New York, etc., R. Co.*, 125 N. Y. 526, 26 N. E. 741, it is said in the opinion: "In case of a death accident at a railroad crossing it must often happen that the circumstances immediately preceding it, and the acts and conduct of deceased are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than when the injured person was alive and competent to testify."

Positive Evidence of Due Care by Deceased Not Required—When Taken for Granted.—In an action to recover for the death of plaintiff's intestate alleged to have resulted from the negligence of defendant, the law does not always require positive evidence of due care for his own safety on the part of deceased. Under certain circumstances it may be taken for granted that he observed usual and ordinary care for his own safety. So held in *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

Negligence and Failure to Show Contributory Negligence—Prima Facie Case.—The rule requiring plaintiff to prove care on the part of his intestate for his own safety only requires evidence of the facts and circumstances attending the injury, and if these show negligence

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in defendant, from which the injury followed as a direct and proximate consequence, and do not show any contributory negligence on the part of deceased, a prima facie case for the jury is made out. So held in *Illinois Cent. R. Co. v. Norwicki*, 148 Ill. 29, 35 N. E. 358.

Plaintiff's Burden of Proof Easily Satisfied.—In *Lyman v. Boston & M. R. Co.*, 66 N. H. 200, 20 Atl. 976, it is said in the opinion: "From this evidence the jury might legitimately infer and find that the defendant failed to exercise due care towards deceased, and that the want of it was a cause adequate to produce the injury to him which resulted in his death. But as in an action for negligence two conditions must concur, a performance of duty by plaintiff, and a breach of duty by the defendant, a proof of a breach of duty by these defendants did not necessarily give rise to the inference of due care on the part of deceased, proof of which was essential to the plaintiff's case. The rule that the burden is on the plaintiff to prove his exercise of proper care is, however, easily satisfied, and the exercise of such care may be shown by circumstantial evidence as well as by direct proof. It even may, under some circumstances, be inferred from the ordinary habits and dispositions of prudent men, and the instinct of self-preservation. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Northern Cent. Ry. Co. v. State*, 29 Md. 420, 428, 31 Md. 357; *Cleveland & Pittsburg R. Co. v. Rowan*, 66 St. 393; *Weiss v. Pennsylvania R. Co.*, 79 Pa. St. 387, *Pierce, R. R.* 299."

Absence of Contributory Negligence—Affirmative Proof Required—Inference—Question for Jury.—In *Caven v. City of Troy* (N. Y. Sup. Ct.), 52 N. Y. Supp. 804, an action for alleged negligence causing the death of plaintiff's decedent, it is said in the opinion: "The doctrine is well settled that, in such an action as this, the plaintiff, to be entitled to go to the jury, was compelled to show, by affirmative proof, the absence of contributory negligence. *Whalem v. Citizens Light Co.*, 151 N. Y. 70, 45 N. E. 636; *Weston v. Troy*, 139 N. Y. 281, 34 N. E. 780; *Kilbridge v. New York Cent., etc., R. Co.*, 17 App. Div. 177, 45 N. Y. Supp. 302, 306. It is true that the absence of contributory negligence may be established by circumstances or may be inferred from the character of defendant's negligence. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65. And where all the facts are before the trial court, and they are such that conclusions can be drawn therefrom, if they allow an inference of the freedom from negligence of the injured party as well as a contrary one, the case is for the jury. *Chisholm v. State*, 141 N. Y. 246, 36 N. E. 184."

Defective Railing—Fall From Bridge at Night—Burden of Proof on Plaintiff.—In *Ryan v. Town of Bristol*, 63 Conn. 26, 27 Atl. 309, it appeared that plaintiff's intestate, in crossing a bridge on foot about midnight, fell over a defective railing into the river, where his body was found the next morning. There was no eyewitness of the accident. It was held, in an action against the town, that plaintiff was bound to show that deceased was in the exercise of ordinary care.

Passenger Struck by Another Street Car While Crossing Track—Absence of Evidence.—Without some proof of absence of contributory negligence, recovery cannot be had for the death of a person struck

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by a street car, where the deceased stepped from one street car in ample time to have crossed a parallel track and to have avoided another car coming in the opposite direction on such track, and there is absolutely no evidence as to his movements from the time of his stepping from the car to the time that he was struck. *Evansville St. R. Co. v. Gentry* (Ind.), 5 Am. & Eng. R. Cas., N. S., 500.

Proof of Deceased's Familiarity with Culvert.—Where the evidence showed that plaintiff's intestate lived near the culvert in a highway which caused his death and was familiar with its character and location, and no evidence was given to show that he was free from contributory negligence, there is an utter failure of proof. So held in *Toledo, etc., Ry Co. v. Brannagan*, 75 Ind. 490, 5 Am. & Eng. R. Cas. 630.

Burden of Showing That Deceased Was Rightfully upon Track.—In an action against a railroad company for wrongfully killing plaintiff's intestate by running cars over him while he was crossing the track, it is incumbent on plaintiff to show by direct testimony, or by presumptions arising from facts and circumstances, that the deceased was, at the time, rightfully and not negligently or improperly upon the track. So held in *Danaldson v. Mississippi & M. R. Co.*, 18 Iowa 280.

Proof of Deceased's Knowledge of Dangerous Condition.—In an action for the death of plaintiff's intestate through the alleged negligence of defendant railway company, after defendant has shown that deceased knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on plaintiff to show that he was in some manner justifiable in exposing himself to the danger, before he can recover. So held in *Coats v. Burlington, etc., Ry. Co.*, 62 Iowa 486, 17 N. W. 760, 15 Am. & Eng. R. Cas. 265.

Deaf Man Struck by Street Car.—In *Adams v. Boston & N. St. Ry. Co.* (Mass.), 78 N. E. 117, 21 R. R. R. 70, 44 Am. & Eng. R. Cas. 70, it is held that, in action against a street railway for the death of a very deaf pedestrian struck by a car while walking along the track, the burden was on plaintiff to prove that deceased was in the exercise of due care.

Crossing Accident—Look and Listen—Obstructed View—No Signals—Matters of Conjecture.—In an action under Mass. Pub. Sts. c. 112, § 212, the plaintiff is bound to show that the deceased was in the exercise of due care and that the accident happened through the negligence of the defendant or the unfitness or negligence of its servants; and an action cannot be maintained where it is only a matter of conjecture whether a person killed while attempting to drive over a crossing in front of an approaching train looked or listened, before crossing, or took any precautions to ascertain whether a train was approaching, or whether his view was obscured, or he was misled by the lack of signals or warning by the gateman. So held in *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453.

Death of Employee Working in Hold of Vessel—Caught between Elevator and Hatch—Unnecessary Exposure to Danger.—In an action to recover for the alleged negligent killing of plaintiff's intestate, it appeared that he was in defendant's employ engaged in tiering up

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freight in hold of one of its vessels and received the injuries which caused his death, while coming up from the hold on an elevator used in the work, by being caught between the elevator and the combing of the hatch; that there was room enough upon the elevator for him to stand without being exposed to danger and there was not evidence from which it could be inferred that he used the precautions of a prudent man. At the request of plaintiff's counsel, the court charged that "if the deceased was rightfully on the elevator at the time of his injury you may assume that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the presence of danger." This was held error. *Riordan v. Ocean Steamship Co.*, 124 N. Y. 655, 26 N. E. 1027.

Fall of Experienced Employee into Tank of Hot Sugar Syrup—Passageway Well Lighted—Nonsuit.—In *Riceman v. Havemeyer*, 84 N. Y. 646, it appeared that deceased was, at the time of the accident causing his death, in the employ of defendant's assistant-engineer in their sugar refinery; that in the basement of the refinery were two rows of tanks with a flagged passageway two feet six inches wide between them; that at one point there was a gutter across this passageway a foot above it, with a block on either side to assist in getting over it; that deceased went through this passageway to examine a pump which was out of repair, and in returning fell into a tank containing hot sugar syrup, which was uncovered, receiving injuries causing his death. Deceased had been in defendant's employ for two days and had during that time been to and fro over this passageway. He had been over it five times just before the accident, and, that time, a fellow servant went over safely, just ahead of him. The passageway was well lighted. Deceased had been especially charged to be careful and not fall into the tank. It was held that plaintiff failed to show directly or inferentially that her testator was free from contributory negligence, and a refusal to nonsuit was error.

Killed by Slowly Backing Train—View Unobstructed for Two Hundred Feet.—In *Krauss v. Wallkill Val. R. Co.* (N. Y. Sup. Ct.), 23 N. Y. Supp. 432, 69 Hun 482, it appeared that a train was backing slowly when decedent was walking across the track, there being two box cars between him and the train; and that he could see down the track two or three hundred feet. All the evidence indicated that he was guilty of negligence contributory to his death. It was held that the case should not have been submitted to the jury, as deceased's freedom from contributory negligence was not shown.

Crossing Accident—Circumstances Must Show Absence of Contributory Negligence—Evidence Balanced.—Where a person has been killed at a railroad crossing and there are no witnesses of the accident, to authorize a recovery against the railroad company, the circumstances must be such as to show that the deceased exercised proper care for his own safety. And where the circumstances point just as much to negligence on his part as to its absence, or point in neither direction, a recovery cannot be had against the railroad company. So held in *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330.

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Excavation in Street—No Light—Absence of Guards—Knowledge of Deceased.—In *Caven v. City of Troy* (N. Y. Sup. Ct.), 52 N. Y. Supp. 804; it appeared that deceased, between 9 and 10 o'clock in the evening, fell into an excavation in a street and received injuries which caused her death; that there was no light upon the street or guard covering the excavation; but that deceased was aware of the dangerous condition of the street, having passed it twice on the day she was injured. There was no evidence that she took any precautions or any circumstances from which they might be inferred. It was held that she was guilty of contributory negligence.

Open Area—Death of Night Watchman—Familiarity with Premises—Mere Food for Speculation.—In *Bond v. Smith*, 113 N. Y. 378, 21 N. E. 128, an action to recover for the alleged negligent killing of plaintiff's intestate, it appeared that defendants were the owners of certain premises occupied by a tenant; that there was a store upon the premises, the rear of which was three feet from the line of an alley; that between the store and the alley was an open area eight feet deep; that the buildings on each side of the store extended to the alley; that the wall of the area adjoining the alley was faced with a stone coping seven inches above the alley and two feet wide, all of which was upon defendant's premises; that the alley was closed at one end and was used only by persons having business with the rear of the buildings facing thereon, and almost exclusively in the daytime; that it had no sidewalks and was always incumbered with barrels, boxes and rubbish; that M. was employed as a watchman, his duty being to pass through the alley hourly during the night and examine the windows and doors of certain buildings abutting thereon; that M. was found in the area, where he had fallen during the night, and died from the injuries received; that he had been on duty in the alley for thirteen nights previous to the one on which the accident happened; that on that night the alley was not lighted. It was held that a refusal to nonsuit was error, as the evidence was insufficient to show or justify an inference of the exercise of ordinary care and prudence on the part of deceased. In this case it is said in the opinion: "We have no right to guess that he (deceased) was free from fault; it was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict."

F. ABSENCE OF CONTRIBUTORY NEGLIGENCE MAY BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE.

1. General Rule.

But even where the burden of proving freedom from contributory negligence on the part of deceased is upon plaintiff, either because of the doctrine prevailing in the jurisdiction or the circumstances appearing from the evidence, that he was in the exercise of due care for his own protection may be established by circumstantial evidence.

Connecticut.—*Ryan v. Town of Bristol*, 63 Conn. 26, 27 Atl. 309.

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Illinois.—*Chicago & A. R. Co. v. Adler*, 129 Ill. 335, 21 N. E. 846, 39 Am. & Eng. R. Cas. 666; *Chicago & Atlantic Ry. Co. v. Carey*, 115 Ill. 115, 3 N. E. 519; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272; *Chicago, etc., Ry. Co. v. Keely*, 103 Ill. 205; *Illinois Cent. R. Co. v. Cozby*, 174 Ill. 109, 50 N. E. 1011; *Illinois Cent. R. Co. v. Norwicki*, 148 Ill. 29, 35 N. E. 358.

Iowa.—*Gorman v. Minneapolis & St. L. Ry. Co.*, 78 Iowa 509, 43 N. W. 303; *Murphy v. C. R. I. & P. R. Co.*, 45 Iowa 661.

Maine.—*State v. Maine Cent. R. Co.*, 77 Me. 538, 1 Atl. 673.

Missouri.—*Richey v. Missouri Pac. R. Co.*, 7 Mo. App. 150.

New Hampshire.—*Miller v. Boston & Maine R. R. (N. H.)*, 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564, 61 Atl. 360.

New York.—*Boyle v. Degnon-McLean Const. Co. (N. Y. Sup. Ct.)*, 61 N. Y. Supp. 1043; *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330; *Fejowski v. Delaware & H. Canal Co. (N. Y. Sup. Ct.)*, 43 N. Y. Supp. 84; *Kane v. Whitaker (N. Y. Sup. Ct.)*, 54 N. Y. Supp. 85; *Morrison v. New York Cent. & H. R. R. Co.*, 63 N. Y. 643; *Riceman v. Havemayer*, 84 N. Y. 646; *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198; 23 Am. & Eng. R. Cas. 313; *Wall v. Delaware, L. & W. R. Co.*, 54 Hun (N. Y.) 454; *Wiwirowski v. Lake Shore & M. S. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023.

Pennsylvania.—*Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Pennsylvania Tel. Co. v. Varnan (Pa.)*, 15 Atl. 624.

Rhode Island.—*Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690.

Wisconsin.—*Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, 46 N. W. 543.

2. Illustrations.

Stop, Look and Listen—Positive Evidence Not Required.—In *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361, it is held that, though it is the duty of one attempting to cross a railroad to stop and look both ways, and listen for approaching trains, positive evidence that he observed such precautions is not essential.

Burden on Plaintiff—Circumstantial Evidence as Affirmative Proof.—In *Wall v. Delaware, L. & W. R. Co.*, 54 Hun (N. Y.) 454, it is said in the opinion: "The burden of showing affirmatively, either by direct evidence or by surrounding circumstances, that the decedent was free from contributory negligence was upon the plaintiff. But, as said by Finch, J., in *Tolman v. Syracuse, Binghamton and New York Railroad Company* (98 N. Y. 203): 'The burden of establishing affirmatively freedom from contributory negligence may be successfully borne, though there were no eye witnesses of the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case, the surrounding facts, and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, the inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by jury and require a choice between possible but divergent inferences.'"

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Deceased Proved Sober, Industrious and Possessed of All Faculties and in Proper Place.—In an action against a railroad company for causing the death of plaintiff's intestate, proof that deceased was a sober, industrious man, possessed of all his faculties, also tends to prove that he was, at the time of the accident, in the exercise of proper care for his own safety. In the absence of direct proof the jury may infer ordinary care and diligence on the part of the deceased from all the circumstances of the case, his character and habits, and the natural instinct of self-preservation. It may also be shown that the deceased, at the time of the injury, was sober, and on his proper way home, and was at a place where he had a right to be, in connection with proof of the negligence of defendant. So held in *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

Not Necessary That Absence of Contributory Negligence Be Shown Beyond Question.—In an action against a railroad for causing the death of plaintiff's intestate, plaintiff is not bound to show, by direct evidence, that deceased was free from negligence; and where there was no eye witness to the killing, the fact that deceased exercised ordinary care for his own safety at the time of the accident may be shown by circumstantial evidence or proof of facts and circumstances from which that fact may be reasonably inferred. And it is not necessary that the absence of contributory negligence shall be shown beyond cavil or question. So held in *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358.

Girl Killed at Crossing—View Obstructed—Unlawful Speed.—Due care on the part of a girl killed by a train may be found by the jury, where there is evidence that box cars on a track and a curve in the main track near a street crossing at which she was killed made it difficult or impossible for her to see the train until it was too late, and that the train was running at an unlawful speed, and without ringing the bell as required by ordinance. So held in *Baltimore & O. S. W. Ry. Co. v. Then*, 159 Ill. 535, 42 N. E. 971.

Killed by Train at Night—Sober and Going Home.—In *Chicago & Atlantic Ry. v. Carey*, 115 Ill. 115, 3 N. E. 519, it appeared that a person was killed in the nighttime by cars; that there was no eye-witness of the accident; that the proof showed that about midnight the deceased left a store a few blocks distant from the place of the accident, and started on the sidewalk in the direction of his home, and was then duly sober; and that the place where he was killed was on his direct route home, and the accident must have happened very soon after he was last seen that night. It was held, in an action to recover for his death, that the circumstances were such as might justify an inference whether or not the deceased used due care, and that direct proof on this point was not necessary.

Proof That Deceased Had Stopped to Look and Listen on Same Day—Irregular Train—Failure of Another to Discover Train.—In *Lyman v. Boston & M. R. Co.*, 66 N. H. 200, 20 Atl. 976, it appeared that deceased had crossed the railroad track at the same point on the morning of the accident on a mowing machine, and had then stopped to look and listen; that no train was due near the time of the ac-

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cident; and that another person, when about to cross the track on a hay wagon, at a point about three quarters of a mile away, looked and listened, but did not discover that the engine in question was approaching, notwithstanding which he barely crossed the track in time to avoid it. It was held that proof of these facts was sufficient to support a finding that deceased was not guilty of contributory negligence.

Brakeman Killed by Low Bridge—No Evidence as to Deceased's Incapacity—Failure to Warn.—Where, in an action for the death of a brakeman by being struck by a low bridge of which he had not been informed, against his employer, the railroad company, there was no evidence that he was insane, intoxicated, or possessed of suicidal intent at the time, it was inferable from the instinct of self-preservation, taken in connection with the manner in which the accident occurred, that he was in the exercise of due care at the time, though there was no direct evidence disclosing his conduct just prior to the accident. So held in *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564, 61 Atl. 360.

Excavation in Highway—Habits and Knowledge of Deceased.—In *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690, it appeared that plaintiff's intestate was found fatally injured in an excavation in a highway. All that was known of the matter was that he had been seen walking along the highway in his usual manner. It was held, in an action against the town, that the case should be submitted to the jury; and they should consider deceased's habits as to temperance and caution, and his acquaintance with the locality, in deciding whether he had exercised reasonable care.

Accident in Railroad Yard—Struck by Unattended Cars While on Sidewalk—Head Muffled—Failure to See Cars.—In *Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, 46 N. W. 543, it appeared that deceased was last seen alive walking beside a switch track in defendant's yard, going eastward towards a street which crossed said yard from north to south; that it was a cold and stormy day, and he had a shawl about his head and ears; that his dead body was found on the switch track about fifteen feet east of a sidewalk which ran along the west side of said street; that blood was found on the east side of that sidewalk and thence along the track to the spot where the body was found; that he had been struck and killed by cars which had passed him going westward and had then been pushed upon said switch track and negligently left to run eastward unattended. It was held that the jury were warranted in finding that deceased, when struck by the cars, was on the sidewalk, where he had a right to be, and that he was not guilty of any contributory negligence in failing to see the cars as they approached him.

G. CONTRIBUTORY NEGLIGENCE NEVER PRESUMED.

In the absence of all evidence on the subject, it is generally held that contributory negligence on the part of a person killed by the alleged negligence of another will never be presumed; no such inference arising from the mere fact that he failed to avoid injury.

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Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. Rep. 1104; *Chicago, etc., Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Suburban Elec. Co. v. Nugent*, 58 N. J. L. 658, 34 Atl. 1069; *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788.

Crossing Accident—Stop and Look—Absence of Evidence—Possibility of Seeing Train.—In an action for damages for the death of a person killed by a train of defendant railroad company, the fact that no proof is offered to show that the decedent, in going on the track, stopped and looked for an approaching train, does not raise the presumption that he did not stop and look, unless the evidence shows that he must have seen the approaching train if he had looked. So held in *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788.

Crossings—Failure to Look and Listen Never Presumed.—In *Chicago, R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993, it is said in the opinion: "It is because people ordinarily, in crossing a railroad track, look and listen for their own protection that a failure to do so is held to be negligence. It can never be presumed, in the absence of evidence, that a person fails to do that which people ordinarily do to avoid injury."

Stop, Look and Listen—Absence of Direct Proof—Inference from Accident.—In *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361, it is said in the opinion: "It is true that it was the duty of deceased, before he attempted to cross the railroad, to stop, and look both ways, and listen for approaching trains, but it does not follow that there can be no recovery for his death, in the absence of direct and positive evidence that he observed these precautions. Nor does it follow that he failed to observe them because he was struck by the passing train."

Crossing Accident—Contributory Negligence Not Presumed.—In *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. Rep. 1104, it is said in the opinion: "In *Continental Improvement Co. v. Stead*, 95 U. S. 161, 164, the Court, speaking by Mr. Justice Bradley, upon the subject of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said: 'Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care.' This principle was approved in *Balt. & Ohio R. Co. v. Griffith*, 159 U. S. 603, 609."

Death of Servant—Knowledge of Danger—Absence of Evidence.—Unless the evidence shows that a servant injured, while in his master's service, had knowledge of the dangers of the service from the master's neglect of duty, it will not be presumed, as no one is presumed to knowingly incur physical pain and death when he can avoid it, at his discretion. So held in *Chicago & Eastern Ill. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021.

Killed by Live Wire in Street—Negligence of Deceased Not Presumed.—A person using a public street has the right to presume that

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it is free from dangerous obstacles, such as live electric light wires, and the mere fact that he is killed by coming in contact with such an obstacle, does not warrant the conclusion that he contributed to the injury by his own negligence. *Suburban, etc., Co. v. Nugent*, 58 N. J. L. 658, 34 Atl. 1069.

H. EFFECT OF PRESUMPTION OF DUE CARE ON PART OF DECEASED.

On the question of the weight to be given to the presumption that a person killed by reason of the alleged negligence of another exercised due care for his own safety, and was not guilty of contributory negligence, the authorities are far from being in harmony. In some jurisdictions it is held that the presumption has no probative value—that it is nothing more than the universally accepted one, that it is not to be presumed that a person failed to do his duty, in the absence of any evidence on the question. In other jurisdictions it may stand for proof of the exercise of due care for his own safety by deceased. And it must be understood that we, in setting out a decision on the effect to be given to the presumption, do not necessarily intend to declare that it lays down the correct general rule on the question covered by it. It will be found from an examination of the cases in this section of our note that even in jurisdictions where the presumption has no probative value the courts sometimes allude to it as existing therein. And some of the expressions in the opinions of such tribunals are confusing, if not misleading, as to whether the presumption is to be allowed any effect.

1. Distinction between "Presumption" and "Inference."

In *Cogdell v. Wilmington & W. R. Co.* (N. Car.), 44 S. E. 618, 8 R. R. R. 487, 31 Am. & Eng. R. Cas., N. S., 487, it is said in the opinion: "The presumption (of due care on the part of deceased) has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and the evidence, and in the other the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

2. Will Warrant Recovery Where Evidence of Defendant's Negligence.

Although it is difficult to lay down a general rule as to the effect to be given to the presumption, it may be stated that in jurisdictions where it is given the most weight, it will warrant a recovery where there is evidence of negligence on the part of defendant.

United States.—*Northern Pac. Ry. Co. v. Spike* (C. C. A.), 7 R. R. R. 749, 30 Am. & Eng. R. Cas., N. S., 749, 120 Fed. Rep. 44.

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Iowa.—*Burns v. Chicago, M. & St. Ry. Co.*, 69 Iowa 450, 30 N. W. 25, 28 Am. & Eng. R. Cas. 409; *Dalton v. Chicago, etc., Ry. Co. (Iowa)*, 21 Am. & Eng. R. Cas., N. S., 460, 46 N. W. 272.

Michigan.—*Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 41 Am. & Eng. R. Cas. 414.

North Carolina.—*Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 53 S. E. 877, 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572.

Pennsylvania.—*Cleveland & Pittsburg R. Co. v. Rowan*, 66 Pa. St. 393.

Rhode Island.—*Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690.

No Eye Witness.—In *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 41 Am. & Eng. R. Cas. 414, it is held that where in a negligence case there is no eye witness to the accident it will be presumed that deceased used ordinary care and caution for his own safety, which presumption is sufficient to permit plaintiff to recover upon showing negligence on the part of defendant. *Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257, 26 N. W. 514, 23 Am. & Eng. R. Cas. 317; Mich. 102; 67 Mich. 680; *Kwiotkowski v. Grand Trunk R. Co.*, 70 Mich. 549, 38 N. W. 463.

3. Instinct of Self-Preservation Will Stand for Proof until Contrary Appears.

In *Cleveland & Pittsburg R. Co. v. Rowan*, 66 Pa. St. 393, it is said in the opinion: "It was contended in argument, on the part of the plaintiff in error, that the plaintiffs below had the onus of showing affirmatively that the deceased was guilty of no negligence or want of care at the moment of disaster to him. This is in one sense the rule, but not as broadly as has been stated. It is true that negligence on his part would defeat the plaintiff's right of recovery, but to call witnesses to declare to the absence of negligence of the kind insisted on, or to prove acts negating negligence before the defendant is bound to answer, is not required in the first place. It is not a necessary averment in the narr., and is, therefore, not required to be proved until the opposite is set up in defense. It is true, if negligence appear by the plaintiff's own testimony, the defendant might rest on it as security as if proved by himself. As the line and the instinct of preservation are the highest motive for care in any reasoning being, they will stand for proof of care until the contrary appears. *Philadelphia & Trenton R. Co. v. Hagan*, 47 Pa. St. 244; *Railroad Co. v. Hall*, 11 P. F. Smith 361; *Allen v. Willard*, 57 Pa. St. 374."

4. Warrants Recovery in Absence of Countervailing Evidence.

The presumption that a traveler killed at a railroad crossing was at the time in the exercise of due care is sufficient to warrant a recovery in the absence of countervailing testimony. So held in *Northern Pac. Ry. Co. v. Spike (C. C. A.)*, 7 R. R. R. 749, 30 Am. & Eng. R. Cas., N. S., 749, 120 Fed. Rep. 44.

Right of Deceased to Assume That Speed Ordinance Would Not Be Violated and Presumption of Due Care on His Part—Defendants' Burden of Proof.—In *Weller v. Railway Co.*, 164 Mo. 180, 198, 64 S. W. 141, 86 Am. St. Rep. 592, it is said in the opinion: "The pre-

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sumption must be indulged that deceased did look and listen before attempting to cross the track, that is, he was in the exercise of proper care. Deceased had the right to presume that the defendant would obey the ordinances of the city regulating the speed of railroad trains, and, when this presumption, together with the presumption that the deceased was at the time of the accident in the exercise of due care, are indulged, the plaintiff was entitled to recover, unless it conclusively appeared from the evidence adduced by plaintiff, either by the direct or cross-examination of her own witnesses, that her deceased husband was guilty of negligence contributing directly to his own injury. *Stone v. Hunt*, 94 Mo. 475, 7 S. W. 431; *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 220, 39 Am. Rep. 503; *Warren v. St. Louis Merchant's Exchange*, 52 Mo. App. 157. And in order to overcome the presumption and to defeat plaintiff's action, it devolved upon defendant to show by the weight of the evidence of failure on the part of deceased to exercise ordinary care to avoid the injury, and that his failure to exercise such care was its proximate cause, and so direct and immediate that, but for the want of such ordinary care, the injury would not have occurred."

Failure to Stop, Look and Listen—Absence of Direct Evidence.—Where there is no direct evidence that a traveler killed by a train at a highway crossing did not stop, look and listen for trains before attempting to cross, the presumption of law that he performed his whole duty will prevail. So held in *Reading & Columbia R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

5. Burden on Defendant to Rebut Presumption.

The burden is on defendant to remove the presumption of due care for his own safety on the part of plaintiff's decedent. So held in *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 53 S. E. 877, 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572.

Burden of Proof Not Shifted to Defendant Where His Evidence Tends to Rebut Presumption—Misleading Decision.—But in *Judge v. Narragansett Elec. Light Co.*, 21 R. I. 128, 42 Atl. 507, it is said in the opinion: "Perhaps there has been no case more productive of confusion and misunderstanding than *Cassidy v. Angell* (12 R. I. 477), 34 Am. Rep. 690. The opinion contains the statement that when the plaintiff shows negligence on the part of defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence. It is this statement regarding the burden of proof, doubtless, which has occasioned the misunderstanding and confusion and which has lead text writers to enroll this State among those which hold that contributory negligence must be shown as a defense, instead of among those which require the proof of due care by the plaintiff as a part of his case. All that was intended by the court in its decision of *Cassidy v. Angell* was that in a case presenting the same facts the plaintiff was entitled to a presumption that the deceased was in the exercise of the care of a person of ordinary prudence, nothing appearing to the contrary. The court did

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not intend to change, nor consider that it was changing, the rule, which has always been considered a settled rule in this state, that the burden of proving the exercise of due care rests on the plaintiff. Though the court held the plaintiff entitled to the benefit of the presumption stated in such a case, yet if evidence is adduced by defendant tending to rebut this presumption, the burden still rests on the plaintiff to satisfy the jury by a preponderance of the evidence that he was in the exercise of due care. The opinion was unfortunate in stating that the burden of proof in such case was shifted from the plaintiff to the defendant, when all that was intended was to give the plaintiff the benefit of the presumption."

6. Instinct of Self-Preservation Does Not Create Proof.

In an action to recover for the death of a person killed by a train at a crossing, even though his injuries occasioned death before he could tell how the accident happened, and no one saw the accident, the natural instinct of self-preservation does not afford proof of the absence of contributory negligence on the part of the traveler. It may give character or force to facts already proved, but it does not of itself add or create proof. So held in *Chase v. Maine Cent. R. Co.*, 77 Me. 62, 52 Am. Rep. 744.

7. Burden of Proving Negligence Not Affected by Presumption.

Where an accident, resulting in the death of plaintiff's intestate, occurred in the absence of witnesses, plaintiff, suing for the death, is not relieved from the burden of proving the negligence of defendant, and that the death was caused by his negligence, merely because it is presumed that decedent exercised due care. So held in *Powers v. Pere Marquette R. Co.* (Mich.), 20 R. R. R. 559, 43 Am. & Eng. R. Cas., N. S., 559, 106 N. W. 1117.

8. Absence of Contributory Negligence—Inference Cannot Be Drawn from Presumption.

While want of contributory negligence on the part of a person killed at a railroad crossing may be established by inferences drawn from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. So held in *Wiwirowski v. Lake Shore & M. S. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023.

I. MAY BE REBUTTED BY CIRCUMSTANTIAL EVIDENCE.

Even when the presumption exists, it may be rebutted by circumstantial evidence.

United States.—*Rollins v. Chicago, etc., Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291, 139 Fed. Rep. 639.

Michigan.—*Wilson v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356, 108 N. W. 1021.

Missouri.—*Buesching v. St. Louis Gas Light Co.*, 73 Mo. 220, 39 Am. Rep. 503; *Flynn v. Kansas City, etc., R. Co.*, 78 Mo. 195, 18 Am. & Eng. R. Cas. 23; *Rapp v. St. Joseph & I. R. Co.*, 106 Mo. 423, 17 S. W. 487.

Pennsylvania.—*Reading & Columbia R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

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Rhode Island.—*Judge v. Narragansett Elec. Light Co.*, 21 R. I. 128, 42 Atl. 507.

Virginia.—*Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901.

Washington.—*Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846, 79 Pac. 997.

Presumption Rebutted by Slight Circumstances—Habits—Mental and Physical Condition—Locus in Quo—Nature of Injury.—In an action to recover for the death of plaintiff's intestate, the presumption that deceased was in the exercise of ordinary care for his own safety when killed may be overcome by slight circumstances, in the absence of direct evidence. The habits and character of the person injured, his mental and physical condition shortly before the injury, the location and character of the object or instrumentality causing the injury, and the nature of the injury itself are all to be considered by the jury. So held in *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 220, 39 Am. Rep. 503.

Where Evidence Tends to Show Contributory Negligence.—Where the evidence tends to show contributory negligence on the part of deceased, alleged to have been killed through the negligence of defendant, it is error to instruct the jury that "the law presumes that he exercised ordinary care." So held in *Rapp v. St. Joseph & I. R. Co.*, 106 Mo. 423, 17 S. W. 487.

Crossing Accident—Presumption Inconsistent with Circumstances.—It cannot be presumed that one killed at a railway crossing was in the exercise of due care, where the attendant facts, explained by any hypothesis that they will admit of, show that such was not the case. So held in *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846, 79 Pac. 997.

Brakeman Crushed between Car and Cattle Chute—Knowledge of Conditions—Going between Cars without Necessity.—A brakeman while directing the movement of a train in making a coupling, was crushed between a car and a cattle chute located on one side of the track. A witness testified that he knew of no necessity for the brakeman to go on that side of the track. The brakeman was familiar with the location of the chute, and, by the exercise of ordinary care, would have known that there was not sufficient space between the chute and an ordinary car. The coupling attempted to be made was made. There was no necessity for his going between the cars to couple them. It was held that the presumption that he was in the exercise of due care was overcome. So held in *Wilson v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. R. 356, 44 Am. & Eng. R. Cas., N. S., 356, 108 N. W. 1021.

Crossing Accident—Driver of Curtained Vehicle Killed at Night—Possibility of Seeing Train.—In *Rollins v. Chicago, etc., Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291, 139 Fed. Rep. 639, it appeared that plaintiff's intestate, who was a young man, was struck and killed by a train on defendant's railroad, while driving over a crossing at night with a team and top buggy, the curtains to which were down. The evidence showed that the train, which

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manager of the Gulf company, residing in Tarrant county, Texas, was also the general manager and local agent of the Pacific company in that state. It was also alleged that F. E. Merrell was the local agent in Tarrant county, Texas, of the Pacific company, and that M. E. Sebree was the local agent for it in said county and state.

Service of citation was made on the defendants by serving the parties above named as its agents in Tarrant county, Texas, in pursuance of the statute of the state. The defendant moved to quash the service on the ground that none of the parties were such agents, and filed in support of its motion the affidavits of each,—Hovey, Merrell, and Sebree,—denying such agency. Thereafter plaintiffs made application for additional process in pursuance of a later statute of the state of Texas, to be hereinafter noticed, and charged that A. L. Thomas, who resides in Tarrant county, Texas, was a train conductor engaged in handling trains over the tracks of the Gulf railroad in the state of Texas and over those of the Pacific railroad beyond the limits of the state, and that he was engaged in running and handling passenger trains on the tracks of both said companies on both sides of the state line, and is an agent and representative of the defendant company, residing in Tarrant county, Texas. It was further charged that V. N. Turpin, who resides in Fort Worth, Tarrant county, Texas, was a ticket agent engaged in the selling of tickets and the making of contracts for transportation and for and in behalf of the Pacific company from the city of Fort Worth, Texas, over the lines of the Gulf company, in the state of Texas, and over the line of the defendant company beyond the line of said state, and was an agent and representative of the defendant company in said state and county.

These persons, Thomas and Turpin, were accordingly served under the application for new process as the agents and representatives of the defendant company in the said county and state.

The defendant company filed a supplemental motion to quash this service upon the grounds that these persons were not the agents or representatives of the defendant company, filing their affidavits in support of said motion. In the return of the writ served on Hovey it was also set forth that he was general manager of the Pacific company, residing in Tarrant county, Texas. The motion and supplemental motion to quash the service was heard by the court, the motion sustained, and the cause dismissed for want of jurisdiction, the court holding that the defendant had not been properly served with process.

From the stipulated facts, documentary evidence, and testimony embodied in the bill of exceptions, the following facts, pertinent to the determination of the issues, may be gathered:

The Pacific company and the Gulf company are both of the "Rock Island system" of railroads. The second annual report of the "Rock Island company" (June 30, 1904) shows that it is the owner of the entire capital stock, except directors' shares, of the Chicago, Rock Island, & Pacific Railroad Company, a cor-

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poration of Iowa; that company owns 695,574.75 shares of the capital stock of the Chicago, Rock Island, & Pacific Railway Company, a corporation of the states of Illinois and Iowa, and 286,349 shares of common capital stock of the St. Louis & San Francisco Railroad Company, a corporation of the state of Missouri, and the report adds:

"Each of the two latter companies operates independently its lines of railway and each is interested through the ownership, directly or indirectly, of at least the majority of the capital stock in certain subsidiary companies, each of which operates its property independently. The lines of the Chicago, Rock Island, & Pacific Railway Company, including lines formerly of the Choctaw, Oklahoma, & Gulf Railroad Company, the Burlington, Cedar Rapids, & Northern Railway Company, and the Rock Island, & Peoria Railway Company, together with the lines of its subsidiary companies, namely, the Chicago, Rock Island, & Gulf Railway Company, and the Chicago, Rock Island, & El Paso Railway Company, comprise what is known as the 'Rock Island system.'

"As the Rock Island company is the owner of the entire capital stock, except directors' shares, of the Chicago, Rock Island, & Pacific Railroad Company, the income of both the companies is included in the following statement."

This report purports to be made by order of the board of directors, was dated October 17, 1904, and was signed by Robert Mather, president. Appended to this report, as a part of it, under the head of "Statements and Exhibits, Rock Island System Lines," was the following statement, to wit:

"On page 23 of said report, under the heading of 'Rock Island System—State of Mileage Operated:

The Chicago, Rock Island, & Gulf Railway Company:

Terral, I. T. (Red River), to Dallas, Texas.....	126.67
Bridgeport, Texas, to Graham, Texas.....	53.29
Texhoma, O. T., to Bravo, Texas-New Mexico state line.....	91.73
Texola, O. T. (Texas state line), to Amarillo, Texas.....	112.97

Total, Chicago, Rock Island, & Gulf Railway Company.... 386.68"

Plaintiff also introduced in evidence a railroad folder, dated July 10, 1904, on which was printed in large letters, "Rock Island System Time-table," in which appears the names of the Chicago, Rock Island, & Pacific Railway Company, Chicago, Rock Island, & El Paso Railway Company, and the Chicago, Rock Island, & Gulf Railway Company, with a list of the names and residences of the passenger and freight agents, and a schedule of the passenger trains on said lines. On the inside of the cover of the folder is a map showing the lines of the said railroad company, so connected as to belong to one system. Below the map is printed:

"The Rock Island System of America.

"The Rock Island system covers a territory which is 1,000 miles long by 1,000 miles wide, supports a population of more than 21,000,000 people, and is capable of supporting at least four

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times that many. The area of this territory is as great as the combined area of France, Germany, Italy, Spain, Austria-Hungary, Denmark, the Netherlands, Turkey, Switzerland, and Greece, and its productive capacity is greater.

"Here are produced more than half the wheat, more than half the corn, and nearly half the cotton, silver, and gold produced in the United States."

The origin of the Gulf Company is thus stated in the annual report of the Rock Island road, June 30, 1904:

"Consolidation of Texas Lines.

"The legislature of the state of Texas, by an act passed March 27th, 1903, authorized the sale of the railroads and properties of the Chicago, Rock Island, & Texas Railway Company, extending from the Red river to Fort Worth, Texas, with a branch from Bridgeport, Texas, to Graham, Texas; the Chicago, Rock Island, & Mexico Railway Company, extending from the Texas-Oklahoma line, near Texhoma, to the Texas-New Mexico line at Bravo; and the Choctaw-Oklahoma & Texas Railroad Company, extending the Texas-Oklahoma line near Texola, Texas, to Amarillo, Texas, to the Chicago, Rock Island, & Gulf Railway Company, which had constructed a line of railroad from Dallas, Texas, to Fort Worth, Texas, where it connected with the line first named above.

"In accordance with the authority granted, the properties referred to were, by appropriate corporate action, deeded to the Chicago, Rock Island, & Gulf Railway Company on December 1, 1903.

"This consolidation permits the properties in question to be operated by one management instead of four separate sets of officials, as heretofore, resulting in economy of operation and greater efficiency in service.

"In stating the assets and liabilities of the companies forming the system, the holdings of the Chicago, Rock Island, & Pacific Railway Company in the bonds and capital stock of auxiliary lines, together with loans between system companies, have been eliminated from the liabilities, and a like reduction made in the value of the assets; the figures as stated, therefore, represent the value of the assets and the real liability without duplication."

Plaintiffs also introduced in evidence the twenty-fourth annual report of the Pacific company for the year ending June 30, 1904, in which it is set forth:

"They have included therein operations and affairs of the operated lines and auxiliary companies forming the 'Rock Island system.'

"In order to make exhibits comparative the figures for the preceding year have been related to meet changed conditions due to the including in this report the operation of the auxiliary companies.

"These lines, thus forming the Rock Island system, are the following:

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The Chicago, Rock Island, & Pacific Railway.....	6,760.74
The Chicago, Rock Island, & El Paso Railway.....	111.50
The Chicago, Rock Island, & Gulf Railway.....	386.92

“On page 9 of said report, under the head of ‘Property’ and ‘Franchises,’ occur the following:

“During the year expenditures were made for construction of extensions and completion of system lines as follows:

Fort Worth, Texas, to Dallas, Texas.....	\$111,371 55
Yarnall, Texas, to Amarillo, Texas.....	108,615 64
Jacksboro, Texas, to Graham, Texas.....	32,138 96
Red River to Fort Worth, Texas.....	28,013 04
Texhoma (Texas state line) to Bravo, Texas.....	9,646 03
Texola (Texas state line) to Yarnall, Texas.....	2,328 30

“In addition to the expenditures during the year as above, there has been transferred to property account sundry amounts expended prior to July 1st, 1903, for construction of new lines and shops, and purchase of equipment, which have been heretofore stated in the system assets as ‘Advances for Construction and Equipment,’ the property represented by such amounts having been deeded to the Chicago, Rock Island, & Pacific Railway Company or the Chicago, Rock Island, & Gulf Railway Company, \$23,169.83.

There has also been transferred to this account the expenditures made prior to July 1st, 1903, for the purchase of shares of capitol stock of the Burlington, Cedar Rapids, & Northern Railway Company and the Rock Island & Peoria Railway Company, also cost of stock of the Choctaw, Oklahoma, & Gulf Railroad Company in excess of its par value and the value of bonds of the Chicago, Rock Island, & Texas Railway Company, owned by the Chicago, Rock Island, & Pacific Railway Company, the value of said property appearing upon balance sheets shown in prior year’s report as ‘Stocks and Bonds of Constituent Companies,’ \$16,446,009.73.

“On page 11 of said report, under the heading ‘New Lines Open for Operation,’ the following statements are made, *viz*:

“Additions have been made to the operated system—mileage since the last report as follows:

“By the Chicago, Rock Island, & Gulf Railway Company, Fort Worth, Texas, to Dallas, Texas, 33.26 miles, opened for operation in December, 1903.

“Yarnall, Texas, to end of track west of Amarillo, Texas, 18.40 miles, opened for operation in November, 1903.

“Corrections in measurements, Red River to Fort Worth, Texas, .83 miles.

“Operated system mileage was decreased 18.22 miles between Yarnall, Texas, and Amarillo, Texas.

“Fort Worth, Texas, to Dallas, Texas.—This line was completed and the line opened for operation by the Chicago, Rock Island, & Gulf Railway Company, December 1st, 1903. It is 33.26 miles in length, connecting with the line of the former the

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Chicago, Rock Island, & Texas Railway Company at Fort Worth, and extending to Dallas, where, by an agreement with the Gulf, Colorado, & Santa Fe Railway Company, it has the joint use of the latter company's terminal facilities.

"The opening of this line gives the Gulf company direct entrance into Dallas, enabling it to compete for the traffic of that important commercial center.

"On page 12 of said report is the following statement, *viz.*:

System Mileage Under Construction.

By the Chicago, Rock Island, & Gulf Railway Company.

Amarillo, Texas, to Texas-New Mexico boundary..... 69.87

"Amarillo, Texas, to Tucumcari, New Mexico. The grading for a considerable portion of this line has been done from Amarillo westward.

"It was deemed advisable, however, to suspend active construction until such time as the business outlook would warrant the expenditure necessary to complete."

Upon the hearing counsel made an agreed statement of facts, as follows:

"The Chicago, Rock Island, & Pacific Railway Company is a consolidated corporation, chartered under the laws of Illinois and Iowa. It has been an existing railroad corporation for over twenty years. In June of the year 1892, and for some years prior to that time, the said railway company owned and operated a line of railway from the city of Chicago, in a southwesterly direction through the states of Illinois, Iowa, Missouri, and Kansas to Minco, Indian territory. During the year 1892 this company extended its line from Minco, Indian territory, in a southerly direction to the north boundary line of Texas in Montague county.

"The Chicago, Rock Island, & Texas Railway Company was a corporation organized under the laws of Texas on the 15th day of July, 1892. It had an authorized capital stock of \$3,000,000 in shares of \$100 each, of which 754 shares were subscribed for at the time of its organization. Below is a list of the names of the stockholders and the number of shares of capital stock of this company subscribed for by each, at its original organization.

[The list shows that of the 754 shares subscribed, 745 were held by one of the attorneys of the Pacific company, and of the other nine shares, three were held by other employees of that road.]

"Under the charter of the Chicago, Rock Island, & Texas Railway Company, it was authorized to construct a line of road from the north boundary line of Texas at a point in Montague county in a southerly direction through Montague, Wise, and Parker counties; the charter, being afterward amended, authorized the construction into Tarrant county. This charter authorized the issuance of first-mortgage bonds amounting to \$15,000 per mile for construction and not exceeding \$5,000 per mile for equipment.

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“When the Chicago, Rock Island, & Pacific Railway Company constructed its line to a point near the north bank of the Red river, north of Montague county, construction work stopped for a period of time. The Chicago, Rock Island, & Texas Railway Company began the construction of its line at the north line of the state in Montague county some time after the Chicago, Rock Island, & Pacific Railway Company stopped work at a point north of Red river. After construction work began on the Chicago, Rock Island, & Texas Railway Company south of Red river, the Chicago, Rock Island, & Pacific Railway Company constructed its line from the point where work had stopped north of Red river, to a connection with the Chicago, Rock Island, & Texas Railway Company at the state line. The Texas company finished the construction of its line into Fort Worth in the latter part of 1893. Some of the same contractors who constructed the Chicago, Rock Island, & Pacific Railway from Minco south to Red river also took contracts for work on the Texas line.

“On the 2d day of January, 1893, after the Chicago, Rock Island, & Texas Railway Company had constructed and was operating its line as far south as Bowie, Texas, it entered into an agreement with the Chicago, Rock Island, & Pacific Railway Company, a true copy of which is hereto attached and marked ‘Exhibit A’ for identification. This agreement went into effect immediately after it was executed, and was acted upon and observed by said companies until the 14th day of April, 1903, when the same was canceled under authority of the board of directors of each company by a written agreement, a true copy of which is hereto attached, marked ‘Exhibit B’ for identification.

[Exhibits A and B are not printed, as they are the contract and cancellation thereof, both made before the present case arose.]

“After the Chicago, Rock Island, & Texas Railway Company had constructed its line, it issued first-mortgage bonds to the extent of \$15,000 per mile thereon, and these bonds were purchased by the Chicago, Rock Island, & Pacific Railway Company, for which it paid the Texas line 100 cents on the dollar. The Chicago, Rock Island & Texas line cost a large sum of money in excess of the amounts for which it issued bonds, which additional cost was paid by application of money subscribed by the stockholders and by borrowing from the Chicago, Rock Island, & Pacific Railway Company, which money so borrowed has long since been returned with interest.

“At the time the Chicago, Rock Island, & Pacific Railway Company constructed its line to Red River there was no town or city at that particular point, but there were towns and cities south, east, and west of there in the state of Texas, and a railroad line, being a part of the Missouri, Kansas, & Texas Railway of Texas, 9 miles south of that point.

“When the Chicago, Rock Island, & Texas Railway Company was first organized its general offices were located at Bowie,

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Montague county, Texas, and remained there for some time, until the charter was amended removing them to Fort Worth. The first general officers elected by the Chicago, Rock Island, & Texas Railway Company, and their residences, were as follows: M. A. Low, Topeka, Kansas, president; J. C. McCabe, Bowie, Texas, general freight agent, and H. F. Weber, Bowie, Texas, vice president, superintendent, secretary, and treasurer. All these men, prior to the time they were elected officials of the Chicago, Rock Island, & Texas Railway Company had been employed in some capacity by the Chicago, Rock Island, & Pacific Railway Company. In 1893 S. B. Hovey was elected vice president of the Texas company and remained the vice president and superintendent of the Chicago, Rock Island, & Texas Railway Company from that date until it was sold out under an act of the legislature in 1903. Mr. M. E. Sebree, who was served with citation in this case, was, for a number of years and until the date of its sale, trainmaster of the Chicago, Rock Island, & Texas Railway Company and assistant trainmaster of the Chicago, Rock Island, & Pacific Railway Company, with jurisdiction on that line up to Chickasha, Indian territory. Prior to the time he was employed by the Chicago, Rock Island, & Texas Railway Company he had been employed by the Chicago, Rock Island, & Pacific Railway Company as brakeman, conductor, etc. M. A. Low, of Topeka, Kansas, remained the President of the Chicago, Rock Island, & Texas Railway Company from its organization until the 8th day of November, 1900, during all of which time he was one of the general attorneys of the Chicago, Rock Island, & Pacific Railway Company.

"The Chicago, Rock Island, & Texas Railway Company never issued or sold any equipment bonds, but before it was sold out under special act of the legislature to the Chicago, Rock Island, & Gulf Railway Company, it had purchased and was the owner of between one thousand and twelve hundred freight cars of various kinds. During the time it had no equipment of its own, it rented rolling stock from various railway companies, but principally from the Chicago, Rock Island, & Pacific Railway Company, and paid therefor prices prevailing between other lines of railway in the state of Texas.

"After the Chicago, Rock Island, & Texas Railway Company constructed its line into Fort Worth from Bowie, and after the execution of the contract between it and the Chicago, Rock Island, & Pacific Railway Company, of date of January 2d, 1893, the most of the passenger and freight trains running over its line from Red River to Fort Worth and from Fort Worth to Red River were operated beyond its lines as the trains of the Chicago, Rock Island, & Pacific Railway Company. The employees operating these trains were under the control of and paid by the Chicago, Rock Island, & Texas Railway Company while working on its line, and they were also under the control of and paid by the Chicago, Rock Island, & Pacific Railway Company while on its line. The equipment in the various trains went as far north

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as the business justified, some of the passenger equipment going as far as Chicago, and some to Kansas City, while the freight equipment stopped at points beginning at Chickasha, and from there north wherever the freight was destined. The passenger equipment coming south stopped at Fort Worth, and the freight equipment, where the freight was handled in car-load lots, went to destination, wherever that might be.

"Whenever necessary the Texas Company would operate a local train to handle freight between Fort Worth and Red river, but as a general rule the through service maintained took care of this business. It operated a local freight and passenger train between Bridgeport and Jacksboro and afterward to Graham from the time that branch was built until it was sold out, which was several years. On the through freight trains the run made by the crews was from Fort Worth to Chickasha and on the through passenger train the run made by the crews was from Fort Worth to Caldwell, Kansas, these crews being handled and paid as above set forth. Outside the Pullman cars, which were in each passenger train, nearly all the passenger equipment used by the Chicago, Rock Island, & Texas Railway Company belonged to the Chicago, Rock Island, & Pacific Railway Company, for which it paid rental, as provided for under the terms of the contract herein first referred to.

"Defendant's witness will testify that the Texas company paid no part of the cost of operating the Chicago, Rock Island, & Pacific Railway, nor did the Pacific company pay any part of the cost of the operation of the Chicago, Rock Island, & Texas Railway, nor did either of them participate in the earnings of the other. The relationship between the companies is fully disclosed by the terms of the contract dated January 2d, 1893, which was observed up to the time of its cancellation.

"The passenger conductors, brakemen, and train guards wear regular train uniforms and on the lapel of the coat are the words 'Rock Island,' and on the cap is the word 'Conductor,' 'Brakeman' or 'Porter.' Any member of these train crews, while working on the line of the Texas company, may be discharged by the proper officer of that company; and while working on the line of the Pacific company may be discharged by the proper officer of that company. Either company, of course, employs additional men when needed.

"At the time the contract of January 2d, 1893, was canceled, the Chicago, Rock Island, & Texas Railway Company was operating about 140 miles of road, and the Chicago, Rock Island, & Pacific was operating about 3,300 miles. For a considerable time after the Chicago, Rock Island, & Texas Railway Company was built into Fort Worth it employed and maintained at its Fort Worth office a train despatcher, who gave orders for the movement of trains over its line, but as a matter of economy this was abolished, and the Texas company paid a part of the salary of the train despatcher located at Chickasha to give orders for the movement of trains over its rails.

"On the 22d day of September, 1903, the Chicago, Rock Is-

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land, & Texas Railway Company under authority of a special act of the legislature known as Senate Bill No. 161, was purchased and absorbed by the Chicago, Rock Island, & Gulf Railway Company, and since that time has ceased to exist as a railroad or do any business as such.

"At the time the Gulf company purchased the Texas company it had constructed and was operating a line of road from Fort Worth in Tarrant county to Dallas in Dallas county. The Chicago, Rock Island, & Gulf Railway Company now owns and operates 386 miles of road, all of which is located inside of the state of Texas. It does not own any railroad outside the state of Texas. It owns at the present time about 1,600 cars, including ballast, refrigerator, and cattle cars, twenty locomotives, and eight cabooses, but does not own any passenger equipment other than the Pullman cars which are used in each of its passenger trains; it rents its passenger equipment from the Chicago, Rock Island, & Pacific Railway Company, and pays therefor current rental charged by connecting lines in Texas. The train crews on both the through passenger and freight trains are handled in the same way that they were when the line into Fort Worth was operated by the Chicago, Rock Island, & Texas Railway Company, but the Chicago, Rock Island, & Gulf Railway Company is now operating in many places local trains between local points in Texas.

"The following is a list of stockholders and the amount of stock of the Chicago, Rock Island, & Gulf Railway Company owned by each.

[The list is not printed, as the record discloses that, except directors' shares the stock is held for the Chicago, Rock Island, & Pacific Railway Company.]

"The Chicago, Rock Island, & Gulf Railway Company is operating under a lease that part of the line of the Chicago, Rock Island, & Pacific Railway Company which begins at the north boundary line of the state of Texas, extending northward to the town of Terral, Indian territory, a distance of about one and one-sixth miles.

"Blank passes, properly signed by different railroads, including the Chicago, Rock Island, & Pacific, Texas & Pacific, Houston & Texas Central, and other lines, are sometimes placed with S. B. Hovey, and when so placed he has the permission of such line to fill in the names of parties and countersign the pass, and when so countersigned such pass is recognized by the line over which it is issued. The local ticket agents of the Chicago, Rock Island, & Gulf Railway Company sell coupons tickets over the Chicago, Rock Island, & Pacific Railway Company's line and nearly all other lines in the United States, which tickets are duly honored by the respective roads over which they read. The Chicago, Rock Island, & Gulf Railway Company operates only one passenger train each way daily between Fort Worth and Dallas, while it operates two trains each way from Fort Worth north. It operates also only a local freight service between Fort Worth

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and Dallas, but no through freight service. Proper officials of the Chicago, Rock Island, & Gulf Railway Company and of the Chicago, Rock Island, & Pacific Railway Company exchange reports with each other as to the amount of exchange business done.

"No dividends were ever paid on the stock of the Chicago, Rock Island, & Texas Railway Company, and none have been paid on that of the Chicago, Rock Island, & Gulf Railway Company. The net earnings of the Chicago, Rock Island, & Texas Railway Company were put into betterments and improvements and the same is the case with the Chicago, Rock Island, & Gulf.

"In 1897 L. G. Hastings, then secretary of the Chicago, Rock Island, & Texas Railway Company, reported to the Interstate Commerce Commission that the Chicago, Rock Island, & Texas Railway Company was controlled by the Chicago, Rock Island, & Pacific Railway Company, through the ownership of a majority of its bonds. In 1899 he reported it as controlled by the Pacific company, through its ownership of a majority of its capital stock.

"On the 2d day of August, 1904, M. E. Sebree, who resides in Fort Worth, Texas, was trainmaster of the Chicago, Rock Island, & Gulf Railway Company, and was also assistant trainmaster of the Chicago, Rock Island, & Pacific Railway Company between the north line of Texas and Chickasha, Indian territory. He is paid by the Gulf company for the work he does for it and by the Pacific company for the work he does for it. S. B. Hovey is vice-president and superintendent of the Chicago, Rock Island, & Gulf Railway Company, and will testify that he is not connected with, nor does he perform any service for, any other railroad.

"After making certain changes and addition, the Chicago, Rock Island, & Gulf Railway Company adopted the book of rules issued by the Chicago, Rock Island, & Pacific Railway Company for the control of the operation of its line, and such rules are now in force. The cars and engines belonging to the Chicago, Rock Island, & Gulf Railway Company, when in need of repairs, have the work done at its shops at Fort Worth and Dalhart, if the cars and engines are convenient to these two points; otherwise, the work is done at some other convenient place, either on or off the line of the Chicago, Rock Island, & Pacific Railway Company, wherever the cars or engines may be at the time the repairs are needed.

"On the 2d day of August, 1904, the Chicago, Rock Island, & Gulf Railway Company had a different president and altogether different executive officers from any of the lines above listed as included in the Rock Island system. The Chicago, Rock Island, & Gulf Railway Company does not now and never has paid any part of the salary of any officer of the Chicago, Rock Island, & Pacific Railway Company, or of any of the lines named as constituting the Rock Island system.

"Before the Chicago, Rock Island, & Gulf Railway Company

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purchased the Chicago, Rock Island, & Texas Railway Company, the Chicago, Rock Island, & Mexico Railway Company and the Choctaw, Oklahoma, & Texas Railroad Company, M. E. Sebree was trainmaster of the Chicago, Rock Island, & Texas Railway Company, and division trainmaster of the Chicago, Rock Island, & Pacific Railway Company, with jurisdiction to Chickasha, Indian territory. Since the purchase by the Gulf Company of the above-named Texas lines Mr. Sebree's jurisdiction extends over what were the Chicago, Rock Island, & Mexico Railway Company and the Choctaw, Oklahoma, & Texas Railroad Company; otherwise there has been no change in his employment or jurisdiction for the past five or ten years.

"The Chicago, Rock Island, & Gulf Railway Company pays a portion of the salary of a joint train dispatcher located at Chickasha, Indian territory, under the same character of arrangement which existed between the Chicago, Rock Island, & Texas Railway Company and the Chicago, Rock Island & Pacific Railway Company. The train dispatcher, in giving orders for the handling of trains on the Chicago, Rock Island, & Gulf Railway Company, is subject to the control, direction, and supervision of the executive officers of the Chicago, Rock Island, & Gulf Railway Company as if exclusively employed by it.

The rails of the Chicago, Rock Island, & Gulf Railway Company on the line running from Fort Worth north connects at the state line with the rails of the Chicago, Rock Island, & Pacific Railway Company. The point of connection is somewhere near the middle of Red river on a bridge. At this particular point there is no town, station, or turnout, and the trains going in either direction do not stop at said point. It was not possible to build a town or station at the exact point of connection."

It was further stipulated as to Thomas, the conductor, and Turpin, the ticket agent, after they were served with process, as follows:

A. L. Thomas "was, at the date of said service, and is now, and has for many years been, a conductor running on and handling passenger trains for the defendant, the Chicago, Rock Island, & Pacific Railway Company, the Chicago, Rock Island, & Texas Railway Company, and later on the Chicago, Rock Island, & Gulf Railway Company, after its purchase of the Texas company running and handling such trains between Fort Worth, Texas, and Caldwell, Kansas. That the run of said Thomas is now and has been from Fort Worth, Texas, to Caldwell, Kansas, as aforesaid, on both sides of the state line, and that Caldwell, Kansas, is the end of the first passenger division on said lines north of Fort Worth. And it is further agreed that V. N. Turpin, upon whom process was served herein as the ticket agent of the defendant company, was, at the date of the service of said process and has been for a long time, ticket agent of the Chicago, Rock Island, & Gulf Railway Company at Fort Worth, engaged in selling tickets for the said Chicago, Rock Island, & Gulf Railway Company, over its lines and also over the lines of

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the Chicago, Rock Island, & Pacific Railway Company and all of its connections. It is further agreed that the facts are that Thomas is carried on the Pacific company's pay roll and paid for services rendered while on that company's line north of the Texas state line; and is carried on the Gulf company's pay roll and paid by the Gulf company for services rendered on its line south of the Texas state line; and that Turpin is carried on the Gulf company's pay roll alone, and is not carried on the Pacific company's pay roll, and is not an agent of the Pacific company, unless the above-stated facts make him one.' "

The annual report of the Pacific company shows that the board of directors of said company consists of thirteen members, with an executive committee of eight members.

The report of the Rock Island company shows that the board of directors of said company consists of sixteen members and its financial committee of six members.

Eleven members of the board of directors of the Pacific company are also members of the board of directors of the Rock Island company. Five members of the executive committee of the Pacific company are also members of the finance committee of the Rock Island company. The officers of the Rock Island company, with two exceptions, are also officers of the Pacific company, and a majority of the officers of either said companies are common to both of them.

S. B. Hovey, upon whom service was made as aforesaid, was also produced as a witness, and testified that at the time of the service of citation upon him he was the vice-president and superintendent of the Gulf railroad company, and resided at Fort Worth, Texas; that he held the same position in the Chicago, Rock Island, & Texas Company before it acquired the Gulf company, and before that time he had been for many years an employee of the Pacific company; that the train despatcher of the Pacific company, located on its lines at Chickasha, in the Indian territory, is also train despatcher of the Gulf company. He was a "joint man," as the trains were operated by the same crews across the Texas state line without stopping; that the movements of trains on the Gulf route are directed from Chickasha as are those on the line of the Pacific company after they cross the state line going northward. The daily reports of the cars on the Gulf line are made to the chief despatcher at Chickasha; that the business could not be handled in any other way.

Settlements between the two companies are made on a mileage basis. Reports are made by the officers of the Gulf company to Mr. Winchel, who is president of the Gulf company and of the Pacific company. The Gulf company keeps a fund on deposit with the Pacific company at Chicago and receives interest thereon; that when the defendant company constructed its line of road across the Red river in 1892 the Texas company was organized, and the Pacific company furnished the money with which the road was constructed south from Red River to Fort Worth. Most of the directors of the Texas company were em-

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ployees of the Pacific company. No dividends were paid on the stock of the Texas company, and when the Gulf company took over its property the directors surrendered their stock in the old company and got back their \$5.00 each; that the transfer to the Gulf company of the Texas road, the El Paso road, and the Mexico road was for the purpose of consolidating these roads and getting under one management the management of the system. The employees who run over both the Pacific and Gulf lines while in Texas are employed and discharged by the latter company; north of the Texas line they are employed and discharged by the Pacific company; the operation of trains was then as it had been before the Rock Island & Texas road ceased to exist; that the Pacific company did not pay any part of the salaries of the heads of the departments of the Gulf Company.—none for the general office. If, the Pacific company, pays the train men according to the number of miles run on its rails. The Gulf company pays the expenses of the men while on the rails of that company according to the number of miles run; that the Rock Island & Gulf Company had separate cars, servants, and agents of its own; that the Gulf company lines booked trains daily between Fort Worth and its northern terminus and back, which trains do not run on the lines of the Pacific road. He also testified that the lines mentioned on the Rock Island folder as constituents of the Rock Island system, namely, the Chicago, Rock Island & Mexico; the Chicago, Rock Island, & El Paso; the Choctaw, Oklahoma, & Gulf; the Chicago, Rock Island, & Texas; and the Chicago, Rock Island, & Pacific, were not operated as one road, but were operated separately; that the revenues were divided, just as revenues earned by the Chicago, Rock Island, & Gulf and T. & P. would be divided; that they were divided on a mileage basis; that no reports were made by the Gulf company to the head of the traffic department of the Pacific company; that reports were made by the Gulf company to the president of the Gulf company, who was also president of the Pacific company; that no representative of the Pacific company was sent to examine the books of the Gulf company further than just as a representative of any other connecting line would occasionally check up business with the Gulf company; that the books of the latter company had never been audited from the Chicago office; that there was no contract between the Gulf company and the Pacific company, except a traffic agreement as to the division of rates, made by the general freight agent of each line, of the same character of contract which exists between the Gulf company and other line with which it interchanges business; that the Gulf company owned about 1,500 or 1,600 freight and cattle cars and about twenty engines, which were marked C. R. I. and G.; the train dispatcher has no power to furnish cars on the Gulf road if I instruct him not to do so; that since he had been vice president of the Gulf company he had had no connection whatever with the Pacific company and no duties to perform with any other railroad than the Gulf company; that for

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traffic hauled over the two lines the Gulf company received the amount agreed upon by the general freight agents in the same manner that the Gulf company and the T. and P. divided the revenues; that neither road pays any part for moving freight over the other line, nor pays any part of the loss sustained while in the hands of the other company by damage to freight; that the Gulf company has on deposit with the Pacific company several hundred thousand dollars, for which it receives 6 per cent. interest per annum. When needed it is checked out.

A copy of the folder of the "Rock Island system's" lines was sent up with the record. A copy of the map shown on the folder is printed on the freight window of the office of the agent of the Gulf company and calendars with that map printed on them are distributed for the purpose of advertising the system lines.

Messrs. D. T. Bomar, S. W. Stewart, J. A. Templeton, and Sam J. Hunter, for plaintiffs in error.

Mr. M. A. Low, for defendant in error.

MR. JUSTICE DAY, delivered the opinion of the court:

This case presents a question of jurisdiction to be determined as one of fact. It may be divided into two propositions: First. Was the Pacific company doing business in the state of Texas? Secondly. If so, were the alleged agents served with process in the state of Texas duly authorized as such, and competent to be thus served, in such wise as to give jurisdiction of the Pacific company?

The statutes which concern service on corporations in the state of Texas are as follows (Sayles' Texas Civil Statutes):

"Art. 1194, § 25. Foreign private or public corporations, etc.—Foreign private or public corporations, joint stock companies, or associations, not incorporated by the laws of this state, and doing business within this state, may be sued in any court within the state having jurisdiction over the subject-matter, in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in the state, then in the county where the plaintiffs or either of them reside."

"Art. 1223. Foreign corporations, how served.—In any suit against a foreign private or public corporation, joint stock company, or association, or acting corporation or association, citation or other process may be served on the president, vice president, secretary, or treasurer, or general manager, or upon any local agent within this state, of such corporation, joint stock company, or association, or acting corporation or association."

By the act of March 13, 1905 (General Laws of Texas, 1905, p. 30), an additional method of serving foreign corporations was provided as follows:

"Sec. 2. That service may be had on foreign corporations hav-

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ing agents in this state in addition to the means now provided by law by serving citation upon any train conductor who is engaged in handling trains for two or more railway corporations, whether said railway corporations are foreign or domestic corporations, if said conductor handles trains over foreign or domestic corporations' tracks across the state line of Texas, and on the track of a domestic railway corporation within the state of Texas, or upon any agent who has an office in Texas, and who sells tickets or makes contracts for the transportation of passengers or property over any line of railway or part thereof, or steamship or steamboat of any such foreign corporation or company.

"Sec. 3. For the purpose of obtaining service of citation on foreign railway corporations, conductors who are engaged in handling trains and agents engaged in the sale of tickets or the making of contracts for the transportation of property as described in § 2 of this act, are hereby designated as agents of said foreign corporations or companies, upon whom citation may be served."

It is settled by the decisions of this court that foreign corporations can be served with process within the state only when doing business therein, and such service must be upon an agent who represents the corporation in its business. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 521, 522, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728.

It is contended upon the part of the plaintiffs in error that the Pacific company was doing business in the state of Texas, because of a partnership arrangement with the Gulf company, or because the latter company was the agent of the Pacific company, or, as is sometimes said, the representative of the Pacific company in the state of Texas. As to the question of partnership, we do not think this record presents a question of that sort. The suit is not for a partnership liability. It is an action upon a single cause of action for the tort of the Pacific company. Service is not had by serving one partner. The real contention is that the service reaches the Pacific company because of the agency or representative character of the Gulf company.

It is true that the Gulf company was the agent of the Pacific company or its mere creature in such a sense that to serve it is equivalent to serving the controlling company? It is a fact that both companies had common agents and employees to a certain extent, but the record shows that such employees were paid in proportion to the business done for each company. And that while in the service of the companies respectively they were under the exclusive management and control of the company in whose service they were engaged, with no power to discharge or employ the one company for the other; and that, although the service was in a sense common, it was kept distinct and separate in the control and payment of the employees while in the separate service of the respective companies.

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It is true that the Pacific company practically owns the controlling stock in the Gulf company, and that both companies constitute elements of the Rock Island system. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific company the power to control the road by the election of the directors of the Gulf company, who could, in turn, elect officers or remove them from the places already held; but this power does not make it the company transacting the local business.

This record discloses that the officers and agents of the Gulf company control its management. The fact that the Pacific company owns the controlling amount of the stock of the Gulf company and has thus the power to change the management does not give it present control of the corporate property and business. *Pullman's Palace Car Co., v. Missouri P. R. Co.*, 115 U. S. 587, 597, 29 L. ed. 499, 502, 6 Sup. Ct. Rep. 194.

In *Conley v. Mathieson Alkali Works*, supra, suit was brought upon a contract with the Mathieson Alkali Works. The defendant has designated no agent upon whom summons could be served, and service was made upon two members of the board of directors resident of the city of New York. Upon motion made to set aside the service of summons a reference was directed to ascertain whether the defendant corporation was doing business in the state of New York. The matter reported, among other things, that the defendant had operated a plant at Niagara Falls, but had conveyed all its property to another corporation organized under the laws of Virginia. That the consideration expressed for the conveyance was \$1 and other valuable consideration, but the substantial consideration was the entire capital stock of the grantee, the Castner Electrolytic Alkali Company. That the business of the defendant since said transfer was carried on in Providence, where it had its principal place of business. The master found that the company at the time of attempted services was not doing business in New York. Of the effect of the transfer of the entire stock of the new company to the defendant the master found: "The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company, and that the operation of that company was carried on under the same management as before December 31, 1900, is not material. The new corporation was a separate legal entity, and, whatever may have been the motives leading to its creation, it can only be regarded as such for the purposes of legal proceedings. It was that corporation alone which transacted any business in this state, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation. *People v. American Bell Teleph. Co.*, 117 N. Y. 241, 22 N. E. 1057; *United States v. American Bell Teleph. Co.*, 29 Fed. 17."

Upon exceptions the master's report and conclusions were affirmed and the service set aside. That judgment was affirmed in this court. In the course of the opinion, Mr. Justice McKenna,

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speaking for the court, coming to deal with the effect of the transfer to the Castner Company, said: "The defendant was competent to convey its property to the Castner Electrolytic Alkali Company and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law which provided for a monthly meeting in New York could not of itself keep the corporation in New York. The testimony is positive that no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; and that all of the business of the corporation was conducted at Providence, except that of a purely manufacturing character, which was conducted at Saltville.

So, in the case at bar, notwithstanding the ownership of the stock in the Gulf company by the Pacific company, the former company transacts the business in Texas, and is a separate legal entity, authorized under the laws of Texas and legitimately carrying on business there.

There is no evidence that the Pacific company may not lawfully hold the stock of the Gulf Company, and under the statute of Illinois it seems to be authorized so to do. 3 Starr & C. Anno Stat. (Ill.) p. 3229. It is true that the Pacific company loaned the money to build the road of the Texas company, predecessor of the Gulf company. But, as was well observed by Judge (afterwards Justice) Jackson in *United States v. American Bell Teleph. Co. supra*: "For one person to supply means for another to do business on is not the doing of that business by the former."

The conduct and control of the business in Texas was intrusted to the Gulf company. As the largest stockholder the Pacific company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contracts and to persons with whom it dealt.

Nor do we think that the persons served with process are agents of the Pacific company doing the business of the company in Texas. Section 2 of the act of March 13, 1905 (Laws of Texas, 1905, p. 30), is very broad, and would seem to comprehend conductors who handle trains for two or more corporations over foreign or domestic roads across the state lines of Texas and on the track of a domestic railroad within the state of Texas, or upon any agent who has an office in Texas and who sells tickets or makes contracts for the transportation of passengers or property over any line of railroad or part thereof of any such foreign corporation or company; and such companies and agents, by § 3 of the act, are made agents of the foreign corporation or company, upon whom the citation may be served. But it is essential to the validity of such service that the corporation shall be doing business within the state, and that the service be upon an agent representing the corporation with respect to such

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business. *Goldey v. Morning News*, and *Conley v. Mathieson Alkali Works*, *ubi supra*.

The conductors, one of whom was served, when he crossed the Texas line, this record shows, became the servant and agent of the Gulf company. The ticket agent sold tickets for the Gulf company, in whose employment he was. He would also sell tickets good upon its line and over the lines of the Pacific company, but he transacted this business as the agent of the Gulf company. As to Hovey, the record fails to show that he was agent of the Pacific company; on the contrary; it shows that he had no connection with the company, and that his duties were confined to the affairs of the Gulf company. The same is true of Merrell, and as to Sebree, the record shows that for the services rendered as trainmaster he was paid by each company for the service performed by it and had no charge as agent of the business of the Pacific company in the state of Texas.

We reach the conclusion that the Pacific company was not doing business in the state of Texas, and that the attempted service was not upon agents of that company transacting its business in that state in such a sense as to give jurisdiction by service of citation upon them. The judgment of the Circuit Court is affirmed.

Dissenting: The CHIEF JUSTICE and MR. JUSTICE MOODY.

HAMBLIN v. NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Bristol, May 15, 1907.)

[81 N. E. Rep. 258.]

Railroads—Crossing Accident—Contributory Negligence.*—Where one driving a closed milk wagon approached a railroad crossing on a dark and foggy morning, and, observing the light of a train, thought it to be the light of a station, and continued to drive his horse upon the tracks at a walk, without taking any further precautions, and a collision ensued, he was guilty of contributory negligence, precluding recovery for his death, though defendant had failed to give the statutory signals.

Exceptions from Superior Court, Bristol County; Edward Pierce, Judge.

*For the authorities in this series on the subject of the care required of a highway traveler at a railroad crossing where his view of approaching trains is obstructed, see foot-notes appended to *Baker v. Tacoma Eastern Ry. Co.* (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723; foot-notes appended to *Keller v. Erie R. Co.* (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599.

For the authorities in this series on the subject of the combined effect of contributory negligence of the highway traveler and failure to give crossing signals, see foot-notes appended to *Porter v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 342; foot-notes appended to *Illinois Cent. R. Co. v. Ackerman* (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76.

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Action by Bertha H. Hamblin, as administratrix of the estate of John H. Hamblin, deceased, against the New York, New Haven & Hartford Railroad Company. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Thomas H. Buttimer, for plaintiff.

Choate, Hall & Stewart, for defendant.

RUGG, J. This is an action of tort to recover damages for the death of John H. Hamblin, which occurred at a highway grade crossing with the tracks of the defendant. The deceased was driving a low-down milk wagon, inclosed with glass windows on ends and sides and a sliding door on each side. He was familiar with the crossing, and knew that a regular train was due at about the time of the accident. The view of the tracks in either direction to the traveler approaching was somewhat obstructed, until within about 35 feet of the tracks, whence to the rails there was an unobstructed view of 1 3-4 miles toward Attleboro station, from which direction the train came which killed the intestate. There were no gates at the crossing, but a flagman was stationed there day and night. The morning was dark and foggy, and it was not day light at the time of the accident. There was in the wagon with the deceased a boy, who described the circumstances attending the accident, in substance, as follows: As they approached the crossing, the horse going at a walk, they looked down the tracks toward the Attleboro station, and saw a light which both thought was at the station. They did not see the flagman, nor did they hear any bell, whistle or warning. After seeing the light, the horse did not jog along, but walked a little bit faster, to get across the track. When the wagon was on the second track, the horse, which had just cleared the tracks, stopped and reared up, and began teetering up and down while "you could count seven." When the horse stopped they looked down the track, and saw the light of the approaching train. The whip was on the outside of the wagon. Hamblin "yelled to the horse to go ahead" and tried to open the door (which slid on rollers), but the blanket caught behind the door, and he could only open it far enough to get his hand out about as far as his wrist, and could not reach the whip. Then the flagman came out and "yelled to the horse to go ahead." Then the train struck them. The case was sent to the jury on the fifth count of the declaration, which was under Rev. Laws, c. 111, § 268, for failure to give the statutory signals, and verdict was rendered for the defendant. The court directed a verdict for the defendant upon four other counts, all of which necessarily alleged and required proof of due care on the part of the plaintiff's intestate. The case comes up on her exceptions to this direction.

The view of the facts most favorable to the plaintiff's contention falls short of sustaining the burden of showing due care on the part of the deceased. A grade crossing of a highway with a steam railroad is universally recognized as a place of extreme danger, where the traveler's attention must be intelligently and

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actively directed to looking out for his own safety. He cannot alone rely upon the railroad and its employees to do their duty, but must actually exercise his own faculties of sight and hearing and common sense to care for himself. The deceased, who was driving, approached the crossing with his horse at a walk. He observed a light a mile or more down the track, which in the dimness of fog and darkness he thought was at a station, but though then in a position of safety he did not pause to further investigate. Nor did he open the door or window of his closed milk wagon, a vehicle itself likely to produce considerable noise, to listen for the usual crossing signal and the rumble of an approaching train. Without urging his horse out of a walk, he started across the tracks. He was boxed up in a wagon, so that he could not use the persuasion of his voice with its usual force and effect to hurry his horse, and he could only use his whip, which was on the outside of the wagon, by opening the door. When danger is imminent, it is discovered that the blanket is so caught behind the door that it cannot be opened far enough to afford any relief. Nor is this a case where the circumstances are such as to excuse a traveler from exercising all his faculties. It was a crossing where there does not appear to have been any other wagon at the time. The atmospheric conditions were such that one could have heard at least with ordinary distinctness, and if there had been any reasonable effort to listen for signs of danger, there is nothing to show that it could not have been detected. It was within the power of the deceased, in the exercise of common prudence, to look and listen in such a way that he could with reasonable certainty have been enabled to see or hear the approaching train if one was within the range of sight and hearing, which is the rule laid down in *Clark v. B. & M. Railroad*, 164 Mass. 434-439, 41 N. E. 666. There is much to be said in favor of the view that where one in the darkness sees a light down a railroad track, which he thinks at first sight is a station light, without pausing to assure himself that it is not a headlight, proceeds with deliberate pace across the rails, he is not using ordinary care; but here are the additional facts of a neglect to listen in such a way as to be likely to hear anything outside his wagon, a failure to have in ready control the ordinary implements of driving, a suffering of the door of the vehicle to become clogged with a blanket so it will not slide, and a walking of his horse across a double track railroad at about train time. Whatever may be said as to the weight of any of these facts alone, taking them all together they are fatal to the plaintiff's right of recovery. *Raymond v. N. Y., N. H. & H. R. R. Co.*, 182 Mass. 337, 65 N. E. 399; *Walsh v. Boston & Maine R. R.*, 171 Mass. 52, 50 N. E. 453; *O'Connor v. N. Y. N. H. & H. R. R. Co.*, 189 Mass. 361, 75 N. E. 614. The cases relied upon by the plaintiff are all distinguishable. In *Hicks v. N. Y., N. H. & H. R. R.*, 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471, there was evidence that the driver stopped and looked and listened before attempting to cross the tracks. In *Tilton v. B. & A. R. R.*, 169 Mass. 253, 47 N. E. 998, two peo-

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ple were listening, the horse was under complete control, and the flagman although in sight made no motion of warning. In *Clark v. B. & M. R. R.*, *supra*, and *Conaty v. N. Y., N. H. & H. R. R.*, 164 Mass. 572, 42 N. E. 103, there were acts by the crossing tender conducting to mislead the traveler. *Lamoureux v. N. H. & H. R. R.*, 169 Mass. 338, 47 N. E. 1009, and *Brusseau v. N. Y., N. H. & H. R. R.*, 187 Mass. 84, 72 N. E. 348, were suits where death was alleged to have resulted from failure to give the statutory signals, and where therefore the plaintiff was not obliged to prove due care; and gross negligence of the decedent was an affirmative defense to be proved by the defendant. Upon a count for this cause in the present case the plaintiff was permitted to go to the jury. The other cases upon which she relies are against street railway companies, where less evidence may sustain the burden of due care than upon railroad crossings.

Exceptions overruled.

BAMBACE v. INTERURBAN ST. RY. CO.

(Court of Appeals of New York, April 16, 1907.)

[80 N. E. Rep. 913.]

Street Railroads—Injuries to Persons on Track—Contributory Negligence.*—Where a boy 11 years and 4 months old undertook to cross the track within less than five or six feet ahead of the horses drawing a horse car, the horses proceeding at a speed of three miles an hour, he was guilty of contributory negligence as a matter of law.

Chase, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Joseph Bambace, as administrator of the estate of Felice Bambace, deceased, against the Interurban Street Railway Company. Appeal by defendant from a judgment of the Appellate Division (97 N. Y. Supp. 1127, 112 App. Div. 898) modifying, and, as modified, affirming, a judgment in favor of plaintiff. Reversed.

Charles F. Brown, for appellant.

James C. Cropsey, for respondent.

HAIGHT, J. This action was brought to recover the damages sustained by reason of the death of plaintiff's intestate, which

*For the illustrations in this series of the question whether or not a child was guilty of contributory negligence, see *Colomb v. Portland & B. St. Ry. (Me.)*, 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293; foot-notes appended to *Murphy v. Boston Elev. Ry. Co. (Mass.)*, 17 R. R. R. 838, 40 Am. & Eng. R. Cas., N. S., 838.

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was caused, as is alleged, by the negligence of the defendant. The decedent was 11 years and 4 months old. On the 23d day of September, 1902, he was fatally injured by being run over by a horse car of the defendant near the crossing of Bleecker street on Carmine street, in the city of New York. The testimony of the plaintiff's witnesses tended to show that the decedent attempted to cross the street from 3 to 15 feet in front of the horses, which were proceeding at about 3 miles per hour, and that as he attempted to cross, the driver whipped the horses, causing them to start up faster, and in doing so hit the decedent, causing him to fall and be run over by the front wheel of the car. There was a sharp conflict between the defendant's and plaintiff's witnesses; but for the purposes of the case we shall assume that the facts are as testified to by the plaintiff's witnesses. One of the plaintiff's witnesses testified that the decedent went upon the track 3 or 4 feet ahead of the horses. Thereupon, in submitting the case to the jury, defendant's counsel requested the court to charge that, "if you believe that the deceased ran or stepped on the track when the horses attached to the defendant's car were not more than 5 or 6 feet from him, as testified to by several of plaintiff's witnesses, then your verdict must be for the defendant." This request was refused by the court, except as he had charged, and to such refusal an exception was taken.

The court had previously charged that "if the jury find that that the deceased ran in or stepped upon the track of the approaching car when the horses attached thereto were no more than 5 or 6 feet distant from him, and that a person exercising reasonable care for his own safety would not have done so in the same situation and under the same surrounding circumstances, then the deceased was guilty in law of contributory negligence, and the verdict should be for the defendant." It will be observed that the charge as made called for a determination on the part of the jury as to whether a person exercising reasonable care for his own safety would have done as this decedent did under the same circumstances, thus calling for a determination of fact as to what another person exercising reasonable care would have done under like circumstances. We consequently are of the opinion that the court had not charged, in substance, the request refused, and that the question arises as to whether the defendant was entitled to have the jury instructed as requested. As we have seen, the plaintiff had submitted evidence tending to show that the decedent undertook to cross the tracks within less than 5 or 6 feet ahead of the horses, and consequently the jury might have so found. If the defendant's car was proceeding at the speed of 3 miles per hour, only about 1 1-3 seconds could have elapsed before the horses would have reached the decedent. The time, therefore, within which the driver of the horses could have whipped them up and accelerated their speed, was so short that the blow could scarcely have been delivered before the decedent was knocked down by the approaching horses. We therefore are of the opinion that the defendant was entitled to the instruc-

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tion asked for, and that, if the jury had so found, it would follow as a matter of law that the decedent was guilty of contributory negligence.

For this reason the judgment should be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, VANN, and HISCOCK, JJ., concur,. CHASE, J., dissents.

Judgment reversed, etc.

STADING v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Nebraska, March 21, 1907.)

[111 N. W. Rep. 460.]

Railroads—Injury to Stock on Track.*—It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and, if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced. *Omaha & Republican Valley Ry. Co. v. Wright*, 66 N. W. 842, 47 Neb. 886, followed and approved.

Same—Evidence.—Evidence examined, and held sufficient to sustain the judgment of the trial court.

Same—Instructions.—Instructions examined, and held not prejudicial.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Dakota County; Graves, Judge.

Action by J. C. Stading against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. T. White, C. C. Wright, R. E. Evans, and B. H. Dunham, for appellant.

J. J. McAlister and C. A. Kingsbury, for appellee.

OLDHAM, C. This was an action for damages for the killing of 13 head of cattle on defendant's right of way within the depot grounds and switch limits of the village of Hubbard, Dakota county, Neb. There was a trial of the issues to the court and

*For the authorities in this series on the question whether it is the duty of those in charge of trains to lookout for stock on or near tracks, see foot-notes appended to *Kansas City So. Ry. Co. v. Ingram* (Ark.), 21 R. R. R. 570, 44 Am. & Eng. R. Cas., N. S., 570.

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jury, verdict, and judgment for the plaintiff. To reverse this judgment, defendant appeals to this court.

The facts underlying the controversy are that on the morning of July 10, 1903, between the hours of 4 and 5 o'clock, two of defendant's freight trains passed through the village of Hubbard, going eastward at a rapid rate of speed. The first train was a regular through freight, which, from the evidence, killed four or five head of cattle, none of which, however, were shown to have been plaintiff's cattle. The special, which followed the regular train in 10 to 20 minutes, ran onto and killed 13 head of plaintiff's cattle at a bridge, which crossed a running stream about 500 yards east of the depot within the corporate limits of the village. The negligence relied upon as a ground of recovery was the careless and reckless operation of the train, and a failure to keep a proper lookout for animals which might have strayed upon the right of way within the switch limits. The evidence shows that the track extends in a straight line for about one mile west of the point of the injury. It also shows that from the depot to the bridge the track is ditched on each side for drainage purposes, and that these ditches increased in width and depth as they approached the banks of the stream at the bridge; that wing fences connected the bridge with the right of way fences which extended west from the bridge, so that, when the stock went down the track to the bridge, they were prevented from escaping by the bridge, ditches, and wing fences. There is an allegation in the petition that the train was running at a rate of speed in violation of an ordinance of the village of Hubbard, but this allegation was denied, and, on objection of defendant, the purported ordinance of the village regulating the speed of trains within its corporate limits was excluded from the jury, and the case was submitted on the allegations of negligence in running the train at a high rate of speed without keeping a proper lookout for trespassing animals at the place of injury.

There was a conflict in the testimony as to the exact time at which the train passed through the village. Two of plaintiff's witnesses testified that it was about 5 o'clock in the morning, that it was daylight, and that it would have been possible to have seen the cattle from a point a mile west of the bridge. Defendant's engineer and fireman, on the contrary, testified that the train passed the station at about 4:25 a. m., that it was foggy and misty, and that, although keeping a careful lookout, they were unable to discover the presence of cattle on the track until they had passed the depot and were within about 500 feet of the cattle. They also testified that, after discovering the stock on the track, they whistled, turned on the air brakes, and took all proper precautions to stop the train, that the cattle ran along the track to the bridge, where they were overtaken and some of them carried across by the engine, and that two freight cars were derailed by the accident. Plaintiff offered in his behalf the testimony of one Fred Bliss, who claimed that he was a fireman on the train at the time the cattle were killed, and that no effort

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was made to check the speed of the train when the cattle were discovered. This witness was flatly contradicted by both the engineer and fireman, who testified that he was not on the train at all. Other evidence was introduced tending to show that he had never been employed as a fireman by the defendant company until the month of August following the accident. If plaintiff's right of recovery depended on the uncorroborated statements of this witness, we would agree with the contention of defendant that his testimony was so improbable, so flatly contradicted, and so fully impeached that, standing alone, it would not support a verdict for the plaintiff. The evidence showed that the cattle escaped from a fenced pasture, in which they had been kept for some time, on the night or morning of the injury, without the knowledge of the plaintiff. There is no dispute as to the fact that the train was on a down grade and running at a high rate of speed when the injury occurred.

The degree of care which should be used to avoid injury to trespassers upon the right of way of a railway company was well defined by this court in the case of Omaha & Republican Valley Ry. Co. v. Wright, 47 Neb. 886, 66 N. W. 842, wherein it is said: "The second argument is based on those cases—respectable in number, if in nothing else—which hold that a railway company's duty to a trespasser is merely to avoid wantonly or recklessly injuring him after becoming aware of his presence. This is supported by the argument that the cattle were trespassers, and that the rules are the same as to liability for property unlawfully upon the track as for persons. We think the same general principle does apply; but the rule in this state is that it is the duty of the railway company not merely to avoid injuring a trespasser after his presence has been discovered, but that those in charge of trains must exercise reasonable care to avoid injuring all persons who are known or who may be anticipated to be upon the track; and the company is liable if the engineer, by keeping such a lookout as is consistent with his other duties, would have observed the trespasser in time to avoid the injury. Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796. 57 N. W. 522; Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645 58 N. W. 1120; Chicago, B. & Q. R. Co. v. Wilgus, 40 Neb. 660, 58 N. W. 1125."

Now, the unimpeached testimony offered by plaintiff tended to show that it was daylight when the injury took place, and that the track was straight for a mile west from the point of the injury, and that there were 13 head of cattle on the track, and that it would have been possible to have discovered their presence a mile away. In Omaha & Republican Valley Ry. Co. v. Wright, *supra*, it was said: "If, as plaintiff's evidence tends to show, it was a clear morning, daylight, the track unobstructed for half a mile, and 340 head of cattle on the right of way, and the engineer failed to see these cattle in time to stop, or, having seen them, to stop if he could, then the inference of negligence would be reasonable." Under this rule, we think the testimony

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offered by the plaintiff was sufficient to raise a reasonable inference of negligence, which it was proper to submit to the jury as a question of fact.

There is no complaint lodged against the action of the trial court in the admission and rejection of testimony, or in the failure to give any instructions requested by the defendant. There is a general criticism on the first instruction given by the court on its own motion, and that it was of unnecessary length and copied too much in extenso the allegations of both the petition and the answer. While we think that a more abbreviated statement of the issues would have fully sufficed, yet we are unable to find anything in the instruction in any way prejudicial to the defendant; it quoted as freely and fully from the allegations of the answer as it did from those of the petition.

The instructions as a whole were rather favorable than otherwise to the defendant's contention. As the sole ground of recovery, they required plaintiff to prove by a preponderance of the evidence negligence of the defendant's employees in the management of the train, and in not keeping a proper lookout to discover trespassing stock at the place of the injury. The court took away from the consideration of the jury the surroundings of the track and bridge at the place of the accident, and directed that it only consider the speed of the train in determining whether or not the employees had used diligence in trying to stop the train after discovering the cattle.

Objection is urged against the action of the trial court in giving so much of the sixth paragraph of instructions as told the jury, "That it is the duty of the engineer in charge of the engine to keep a vigilant lookout for obstructions upon the track ahead of the engine, and when he finds the track is obstructed, and there is apparent danger either to injury of trespassing animals or to the train in his charge, it becomes his duty to use every effort at his command to avoid injury." The objection to this instruction is that it places a higher duty upon the engineer than is required by law in regard to keeping a lookout for trespassing stock and using every effort at his command in avoiding an injury when such stock is discovered. It is true, as contended by defendant, that the engineer is only required to keep such a lookout as is consistent with his other duties, and we think by paragraph 3 of instructions given at defendant's requests, the jury were so directed. This instruction is as follows: "No. 3. The jury are instructed that the undisputed evidence in this case shows that the cattle of the plaintiff killed in this case were trespassers on the defendant's right of way at the time they were killed, and that the only requirement of the law is that the defendant keep such lookout as is consistent with the other duties of the engineer to discover trespassing stock, and after discovering that stock is in danger that the defendant shall exercise reasonable care not to run into them; in other words, that the defendant use reasonable means to stop." While the instruction complained of, if it stood alone, might have suggested an extraordinary degree of

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care which the law does not require, yet, when read in connection with paragraph 3, as above set out, we think the jury would not have understood from it that the engineer's whole duty was to keep a vigilant lookout for trespassing animals on the track.

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

CHICAGO, I. & L. RY. CO. v. RAMSEY.

(Supreme Court of Indiana, April 30, 1907.)

[81 N. E. Rep. 79.]

Action—Single and Entire Cause of Action.—Where two steers belonging to plaintiff were struck by the same locomotive within a few seconds of the same time, one being killed and the other mortally wounded, there was one cause of action for the killing of the steers.

Railroads—Injuries to Animals on Track—Private Crossings.*—Burns' Ann. St. 1901, § 5321, provides that, when a railroad is fenced where a private way is constructed across the tracks, the owner shall maintain gates and keep them securely locked. Section 5322 provides that, if animals are injured on the track of a railroad, it shall not be liable in damages if the animals entered on the track through gates at a private way, unless through the negligence of the railroad. Held, that where plaintiff's animals entered on a right of way at a point where the road had failed to maintain a fence, though it should have done so, and, leaving it, crossed the lands of another, and again entered upon the right of way through a private gate, where they were killed, the two entries were separate and distinct, and the road was not liable.

Same—Statutes—Construction with Reference to Common Law.—Since Burns' Ann. St. 1901, § 5322, exempting railroads from liability where stock enters at a private crossing, "unless * * * caused by the negligence * * * of the company," does not define what shall constitute negligence. It must be determined by the rules of the common law.

Same—Question for Jury.†—Evidence that an engineer, while run-

*See foot-notes appended to *Chicago, etc., R. Co. v. Sevcek* (Neb.), 15 R. R. R. 185, 38 Am. & Eng. R. Cas., N. S., 185.

†For the authorities in this series on the subject of the care required of those in charge of trains to avoid collisions with animals, see foot-notes appended to *Mobile & O. R. Co. v. Morrow* (Ky.), 21 R. R. R. 644, 44 Am. & Eng. R. Cas., N. S., 644.

For the authorities in this series on the subject of the duty of trainmen to lookout for stock, see foot-notes appended to *Kansas City So. Ry. Co. v. Ingram* (Ark.), 21 R. R. R. 570, 44 Am. & Eng. R. Cas., N. S., 570.

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ning 25 or 30 miles an hour, might have seen cattle on the track for a distance of 800 feet, and did see them 400 feet from the point where they were struck, blew the whistle, gave the usual signal for animals on the track, but failed to check the train until they were struck, did not constitute negligence as a matter of law.

Appeal from Circuit Court, Monroe County; J. B. Wilson, Judge.

Action by John Ramsey against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court (79 N. E. 1065) under section 1337j, Burns' Ann. St. 1901. Reversed.

E. C. Field, H. R. Kurrie, and J. E. Henley, for appellant.
East & East, for appellee.

HADLEY, J. Action by appellee for the killing of two steers. The complaint is in two paragraphs; the first stating the cause of action under the statute, alleging that the steers went upon the railroad track at a point where the same might have been, but was not, securely fenced. The second is predicated upon the alleged negligence of appellant's servants in the management and operation of its train. A demurrer to each paragraph of the complaint was overruled. The case was put at issue by general denial. There was a special finding of facts, conclusions of law stated, and judgment rendered thereon in favor of appellee for \$90.

Appellant's first proposition is that the trial court did not have jurisdiction over the subject-matter of the action; that as each animal was of the value of \$45, and as they were killed at different times, there were two separate causes of action, each of which was within the exclusive jurisdiction of a justice of the peace, citing Burns' Ann. St. 1901, § 5313, Louisville, etc., Co. v. Quade, 101 Ind. 364, and other cases. The proposition would be sound if its premise were sound; but the finding is that the steers were killed, one instantly, the other mortally wounded, by being struck by a locomotive, running 25 or 30 miles an hour, at points about 200 feet apart. These findings show that, while both animals were not struck at precisely the same moment, the time intervening could not have amounted to more than a few seconds, and for the purpose of this action will be regarded as the same time.

The facts specially found applicable to the first paragraph of the complaint may be summarized as follows: Appellant was the owner of 13 steers, kept in an inclosed pasture, surrounded by a fence, in good repair and sufficient to turn stock. On the 1st day of May, 1904, they escaped from said pasture without plaintiff's fault or knowledge, and he did not know that they had escaped until he was informed on the morning of the 2d of May that two of them had been killed by defendant company; that, after the steers left plaintiff's pasture, they entered upon defendant's right of way at a point near said pasture, where the defendant had failed to construct and maintain a fence, and

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where it could and should have been fenced. From the place of entry, the cattle passed along the line of the railroad to Clear creek, where they passed under a bridge constructed by defendant over said creek, from the east to the west side of the railroad, and continued their course west over the lands of others, until they arrived at and entered upon the lands of one Ketcham, whose land lay on both sides of the railroad. There had been therefore erected gates in the right of way fence, and a private farm crossing constructed across the right of way and track of the railroad for the use and convenience of Ketcham, and upon his request. When the cattle went upon the land of Ketcham, the west gate of said private farm crossing was open, and they passed through said open gate onto the defendant's railroad, and then and there the two animals were killed, one instantly, and the other mortally wounded, by being struck, while on the track, by a locomotive drawing a train and running upgrade at the rate of 25 or 30 miles an hour, and at places about 200 feet apart. The animals killed were worth \$90.

In 1877 the Legislature passed an act requiring railway companies to securely fence their right of way, making no exceptions or provisions for private farm crossings. A line of decision followed the passage of this act, construing its provisions to the effect that, if a railroad company constructed, or permitted the landowner to construct, a private crossing for his accommodation, such landowner thereby waived the benefit of the statute as to all animals of his own that passed to the railroad through such private gate, but as to all other persons the obligation of the company to securely fence its right of way existed at private crossings the same as elsewhere, and the company liable for injury to animals of others entering upon the railroad at such crossings. *Wabash R. R. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814, and cases cited. This remained the law until 1885, when an act was passed providing that persons owning land on both sides of the railroad should have the right to construct and maintain private wagonways across the railroad, and, when such railroad is fenced such landowner shall erect and maintain substantial gates in the lines of such fence, and keep the same securely locked. It is further provided: "If such animals are killed or injured on the track of such a railroad by the cars of locomotives thereof, the company owning or operating such railroad shall not be liable to pay damages if such animals entered upon the track through such gates, unless it is proved that the injury was caused by the negligence of the company." Acts 1885, p. 148, c. 44; Burns' Ann. St. 1901, §§ 5320, 5321, 5322. The act of 1885, and all previous legislation, and decisions of the court, construing the same, were reviewed in the case of *Hunt v. Lake Shore*, 112 Ind. 69, 13 N. E. 263, and the conclusion there reached that by the latter act the manifest intention was to give the farmer, who prior thereto had no such power, the right to force a wagonway across a railroad that traversed his land, and to relieve railroad companies from all liability for injuring or killing of animals that got upon

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the track by passing through one of such gates. In other words, under the act of 1885, a railroad company is not liable in the absence of negligence, for the injury or killing of animals that enter upon its tracks by a gate of a private farm crossing. We are still satisfied with the ruling, and this decision must dispose of the present case, if it is found that the cattle in question went upon the railroad track through such gate.

It will be recalled that the cattle broke out of their pasture, and, traveling, they reached the railroad at a place where it might have been, but was not, fenced. The plaintiff himself testified that the unfenced road the cattle entered upon was a stone quarry switch, and not a part of the main road. The special finding continues to state that the cattle went along the road till they came to Clear creek; then went down into the creek, and passed under the bridge from the east to the west side of the right of way of the main track; thence, continuing west some distance, over the lands of others, reached and entered upon the lands of one Ketcham; and thence passed to the railroad track through an open gate to a private crossing constructed for the convenience and accomodation of Ketcham and upon his request, Relying on a long lime of cases which hold that the test of liability for animals killed is the point of entry upon the railroad, and not the place where killed, appellee earnestly contends that the special finding shows that the animals sued for entered upon the railroad at a place where the company was bound to fence, and not through the gate of a private crossing. We cannot accept this view as a correct rendering of the facts. The first entry upon the railway ended when the cattle passed under the bridge and off the railroad right of way to the west. They traveled over the lands of others, and reached and entered upon the farm of Ketcham, and while on the latter's farm went through an open gate of his private farm crossing unto the railroad, and were then and there killed. How long they wandered, or how far from the bridge was the point of second entry, is not stated? It is, however, very clear they were uninjured when they left the railroad of their own accord at the bridge, and that they would not have been injured at all by defendant's cars if they had not re-entered upon the railroad. Having abandoned the railroad at the bridge, we are unable to see any causal or proper connection between the first and second entry. For aught that appears, the second entry might have been miles distant from the first, and might have occurred hours after the first, and we feel compelled to regard them as separate and distinct entries. The cases of *J. M. & I. R. R. Co. v. Lyons*, 72 Ind. 107, and *L. N. A. & C. R. Co. v. Etzler*, 3 Ind. App. 562, 30 N. E. 32, relied upon by appellee as supporting his claim that the two constitute, but a single entry, cannot be accepted as authorities on that point. In each of these cases the animals injured passed onto the railroad at a place where the company was bound to fence, and while there were frightened and driven by a train along the track to a part of the railroad that was properly inclosed, and there killed. It seems clear to us that the entry that resulted in the killing of the

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animals was through the gate of a private farm crossing, and that the case must be governed by the rule declared in *Hunt v. Lake Shore*, 112 Ind. 69, 13 N. E. 263, and *Pennsylvania Co. v. Spaulding*, 112 Ind. 47, 13 N. E. 268.

With respect to the second paragraph of complaint that counts on negligence of appellant's servants in managing the train, the facts disclosed by the special findings are, in substance, as follows: The defendant's track is practically straight for a distance of 800 feet south of the point where the first steer was struck, from which point the engineer in charge of the train might have seen the cattle on the right of way, if he had looked. Said engineer did see the cattle when about 400 feet south of where the first one was struck, and blew the engine whistle, and gave the usual signal for animals on the track, but failed to stop or check the train, until both animals were struck. The steers escaped from their pasture, and were killed, as aforesaid, without any fault on the part of the plaintiff. In section 5322, *supra*, exempting railroad companies from liability where stock enters at a private crossing, there is this exception, "unless it shall be proven that such killing, or injury was caused by the negligence of the servants of the company." There being no definition of what shall constitute the negligence referred to by the statute, it must be determined by the rules of the common law. The charge in the complaint is that the employees knew that the cattle were on the track, and would be injured by the onward movement of the train, and with this knowledge they went ahead, instead of bringing the train to a stop, as they might have done. The finding is that the engineer might have seen the cattle on the right of way 800 feet, if he had looked, and did see them for a distance of 400 feet, and blew the whistle, but failed to stop his train until after the animals were killed. It is not shown that the cattle were on the track when the engineer could have seen them. For aught that is found, they might have been at the bottom of a high embankment, and not reasonably expected to run upon the track in front of the train. Besides, there is no finding that the engineer did not try to stop the train, or that he could have stopped it, if he had tried. It rested upon the plaintiff to prove the negligence. It is a familiar rule of practice that, if a finding is silent upon a material fact, as to that fact it will be presumed against the party having the burden of proof. *Dennis v. L. N. A. & C. R. Co.*, 116 Ind. 422, 18 N. E. 179, 1 L. R. A. 448. The railroad company owes the plaintiff no duty to be on the lookout for his cattle. They were wrongfully and unexpectedly on the right of way, while the company was running its train at a speed and place where it had a right to run it unobstructed by the presence of the cattle, if the employee in charge of the locomotive actually saw the steers on the track, and could have stopped the train with reasonable effort and safety, and avoided the injury, whether his failure to do so, under the circumstances, constituted negligence, was a question of fact; but it is plain that we cannot say, as a matter of law, that his failure to see, or heed if he did see, the cattle on the right of way, 800

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feet distant, was negligence. Neither can we say, as a matter of law, that he could have stopped the train, moving, as it was, 25 or 30 miles an hour, within a space of 400 feet, and avoided the injury. *Dennis v. L. N. A. & C. R. Co.*, 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448. Upon the facts found, it does not appear that there was any duty resting upon the engineer to bring his train to a stop, and, by conceding to him the presumption of due care, it must be held that the second paragraph of the complaint was not made out.

For error of the court in stating its conclusions of law, on the special finding of facts, in favor of the plaintiff, the judgment is reversed, with instructions to the Monroe circuit court to state the conclusions of law in favor of the defendant, and render judgment accordingly.

Judgment reversed.

WEAVER v. COLUMBUS, S. & H. RY. CO.

(Supreme Court of Ohio, March 19, 1907.)

[81 N. E. Rep. 180.]

Writ of Error—Review—Presumptions.—It results from the provisions of section 6709, Rev. St. 1892, that in all subsequent proceedings the presumption must be indulged that the circuit court passes upon all assignments in a petition in error prosecuted before it, and that when it reverses a judgment of the court of common pleas it holds all assignments of error to be not well taken, except such as, in its mandate, may be stated as the basis of its judgment of reversal.

Same.—A petition in error prosecuted in this court for the reversal of a judgment of reversal rendered by the circuit court meets a presumption in favor of the entire record of that court, including its express or implied holding against all assignments of error there made, and not specified as ground of reversal.

Same—Record—Matters to Be Shown.—When, in such case, the plaintiff in error in this court has printed so much of the record as will show the error of which he complains, and the defendant in error desires to support the judgment of reversal which he has recovered in the circuit court by showing that it should have been rendered upon assignments of error which were there expressly or impliedly overruled, he should, within the time fixed for the filing of his brief, print and file so much of the record as, in connection with the printed record already filed, will show that such assignments were improperly overruled.

Railroads—Operation—Care Required—Crossings.*—When a railway company operates its trains over a highway crossing at grade in

*For the authorities in this series on the subject of the care required in operating trains or cars at crossings where the view of highway travelers with respect to approaching trains is obstructed, see foot-notes appended to *Bilton v. Southern Pac. Co. (Cal.)*, 19 R. R. R. 797, 42 Am. & Eng. R. Cas., N. S., 797.

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a municipality where buildings are so situated as to obscure the approach of trains, it is charged with the duty of exercising care commensurate with the danger there existing, although that may exceed the giving of signals by bell and whistle; but it is not the insurer of the safety of travelers using the crossing, though in so doing they exercise ordinary care.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Action by one Weaver against the Columbus, Shawnee & Hocking Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Plaintiff brought suit in the court of common pleas to recover from the railway company damages for personal injuries sustained by him in a collision between his wagon upon which he was riding, and a train of the railway company at a grade crossing in the village of Rendville, in Perry county; the collision resulting, according to the allegations of his petition, solely from the negligence of the company, while he was in the exercise of due care. The specific charges of negligence against the company were the construction and maintenance by it of a building so situated with respect to its road and the highway on which he was approaching the crossing that it interrupted, and, in connection with other buildings, prevented a view of the approaching train; that the train came upon the crossing at a high and dangerous rate of speed; that those operating it kept no lookout for persons about to cross the track; that warnings were not given and no whistle was blown or bell rung; and that the train might have been stopped without injury to him after his peril would, with ordinary care, have been discovered. It is alleged that all this was done with the company's knowledge of the character of the crossing. In its answer, the company denied the allegations of the petition respecting its negligence, and alleged that the injuries which the plaintiff sustained were due to his own negligence. On the trial evidence was offered in support of the allegations of both petition and answer. Thereupon, after argument, the trial judge instructed the jury with respect to the law of the case, giving, among others, the following instruction: "If the crossing where the collision occurred was rendered dangerous, and the view of the railroad track was obstructed, so that travelers on the public highway could not see the railroad track in the direction from which the train was approaching because of the tool house or blacksmith shop kept and permitted to stand so near defendant's track, then the company must use such care and take such precautions to warn travelers on the public highway that, notwithstanding such obstructions, they, by the use of ordinary care, can avoid injury." A verdict was rendered for the plaintiff, and the company filed a motion for a new trial upon a number of grounds. The motion was overruled, and a judgment rendered for the plaintiff for the amount of the verdict. The company thereupon filed a petition

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in error in the circuit court for the reversal of said judgment; ten grounds being assigned, and one of them being that the trial judge erred in the instructions given to the jury. In the circuit court the judgment was reversed for error, as appears from its record, in giving the above-quoted instruction; the journal containing no express ruling upon any of the remaining assignments of error. A petition in error is filed here for a reversal of the judgment of the circuit court, and with his petition the plaintiff files a printed record containing so much of the original record as relates to the propriety of the instruction stated as the ground of reversal.

L. G. Addison and J. L. Hampton, for plaintiff in error.

Thomas E. Powell, Stewart & Stewart, and Fred C. Rector, for defendant in error.

SHAUCK, C. J. (after stating the facts). It is said that the circuit court was of the opinion that, upon the trial, the court of common pleas had committed errors other than the giving of the instruction quoted in the statement of the case, and that it erred in overruling the motion for a new trial upon the grounds therein stated; one of them being that the verdict was contrary to the weight of the evidence, that being a ground upon which this court would not review the judgment. The entry of judgment in the circuit court specifies the instruction quoted as the error found in the record, and states it as the sole basis of its judgment of reversal. The duty of the circuit court in the premises is plainly prescribed by section 6709. Rev. St. 1892, which provides that: "All errors assigned in the petition in error shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, the circuit court shall, in its mandate to the court below, state the error or errors found in the record upon which the judgment is founded." It must be presumed that the circuit court is aware of this provision of the statute and of the pertinent construction which this court placed upon it in *Kramer v. T. & O. C. R. R. Co.*, 53 Ohio St. 436, 42 N. E. 252. In the performance of its plainly prescribed duty, it passed upon all the errors assigned in the petition in error presented to it, and stated the instruction referred to as the only basis of its judgment of reversal. This necessarily implies that it overruled all other assignments of error, though such overruling be not expressly stated in the judgment entry.

It is further urged that not enough of the record is printed to enable us to reverse the judgment of the circuit court, though we may think it erroneous upon the ground stated. The view presented is that, if the circuit court properly reversed the judgment of the court of common pleas, it cannot be material whether it based its judgment on a sufficient ground or not, and that the portion of the record which has been printed will not enable us to determine that the circuit court should not have rendered the same judgment because of other errors assigned there. That

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we could not, upon this printed record, pass upon all the errors assigned in the circuit court is obvious. But the conclusion suggested does not follow, since the reason which conducts to it is variant from recent legislation and adjudication looking to greater simplicity in proceedings in error; that being in proper recognition of their remedial character. When the statute and the decision referred to are considered in connection with the provisions of section 6711 of the Revised Statutes of 1892, that "when a petition in error is filed in the Supreme Court so much of the record to be reviewed as will show the error complained of shall be printed," it becomes apparent that a proceeding in error instituted here for the reversal of a judgment of the circuit court meets a *prima facie* presumption in favor of the regularity of the entire record in the circuit court. When the review is in a case in which that court has reversed a judgment of the court of common pleas, the presumption extends not only to the ground stated by it as the basis of the judgment of reversal, but as well to all the grounds of error assigned there which it has adjudged, whether expressly or by implication, not to be well taken. By whom should that presumption be overcome, if not by him who desires that the error be made to appear? In accordance with the view suggested, if the present defendant in error desired to present here, in support of the judgment of reversal which it had recovered in the circuit court, and assignment of error which it believes to have been erroneously overruled by that court, whether the ruling was express or implied, it would have followed correct and established practice by printing and filing here within the time prescribed for filing its brief, such further portions of the record as would make that error appear. Since it has not taken that course, and since the printed record which the plaintiff in error has filed presents all of the record that is material to the grounds of reversal stated by the circuit court in the entry of its judgment, the case is before us for decision upon the sufficiency of that ground.

From a consideration of familiar principles of the law of negligence illustrated in numerous cases, some of which are cited in the brief of plaintiff's counsel, it is apparent that in such circumstances as were alleged in the petition, and shown by the plaintiff's evidence, the duty of a railroad company operating trains over a highway at grade is not limited to the giving of signals by bell and whistle. These signals are required at grade crossings in the open country, and the elementary rule that the degree of care to be exercised is determined by the danger to be apprehended should require additional precaution when the crossing is in a denser population, and when structures maintained near the track obscure the view of approaching trains. This view of the subject was taken by this court in *Railway Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321. The rule upon the subject has been correctly stated to be that: "Where the surroundings are such as to render a crossing particularly dangerous, it is the duty of the company to exercise care commensu-

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rate with the danger, and especially, if the company had created unusual danger at or near a crossing, it must meet such peril with additional precautions." But the difference between the obligation of the company thus stated and that prescribed in the instruction given in the present case is obvious. According to the instruction, the company is, in such circumstances, the insurer of the safety of all who attempt to cross its tracks exercising ordinary care. The obligation of the company "to take such precautions to warn travelers on the public highway that, notwithstanding such obstructions, they by the use of ordinary care can avoid injury," would leave no place for accidents or such fortuitous happenings as may result from causes which would not be observed by ordinary care exercised by either or both of the parties, and which ordinary prudence would not anticipate. Such a rule, if recognized and enforced, would make the company liable for injuries resulting from the negligence of others than parties to the suit. Indeed, in such situations it would be an inexpensive and effective substitute for a policy of insurance against accidents.

Judgment affirmed.

CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

PITTSBURGH, C, & ST. L. RY. CO. v. SIMONS.

(Supreme Court of Indiana, Jan. 9, 1907.)

[79 N. E. Rep. 911.]

Railroads—Operation—Injuries to Persons on Tracks—Action—Pleading—Specific Allegation of Negligence.—A complaint in an action for injuries caused by the operation of a railroad alleged that defendant knowingly and negligently maintained and operated, at the place of accident, a switching device that was extremely dangerous, particularly to children passing along or across the railroad track at that point, in this: that the space between the throw rail of the switch and the west rail of the main track was not blocked, but left open in such a manner that persons crossing the track at that point were liable to get their feet fastened therein, and further alleged that the engine and cars could have been stopped at any time within a space of 30 feet, but defendant's employees, knowing the dangerous condition of the place and the custom of children to pass over the same, negligently failed to keep watch of the track ahead of the backward moving train and so ran the cars toward and over plaintiff. Held, that the complaint was sufficiently specific.

Same—Evidence—Questions for Jury.—Whether a person injured by being run over by one of defendant's trains while attempting to cross its railroad tracks was on such tracks as a mere licensee or by invitation, held, under the evidence, to be a question for the jury.

Same.—In an action for injuries caused by the operation of a railroad, whether defendant was guilty of negligence in failing to block a

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frog of a passing switch, lying in a path used by the public generally and on which plaintiff was injured, was a question for the jury.

Same—Injuries to Children.*—In an action for injuries to plaintiff, a child eight years old, caused by one of defendant's trains being backed down upon him while on its tracks by defendant's invitation, defendant could not relieve itself of liability on the theory that plaintiff, with full knowledge and appreciation of the danger, voluntarily encountered it and thereby took upon himself the risk incident thereto in the absence of anything to show that he knew or appreciated the danger, since the appreciation of such danger by a child of plaintiff's age would not be presumed.

Same—Admissibility of Evidence—Reversible Error.—In an action for injuries to plaintiff caused by being run over by one of defendant's trains while his foot was caught in a switch in which it became fastened while he was attempting to cross its tracks at a place where he had a right to cross, the action of the trial court in permitting a question to be asked plaintiff as to whether he could have got across the track when he started across before the train got there, if his foot had not caught, to which he answered in the affirmative, was not reversible error in the absence of any evidence tending to show that plaintiff was guilty of contributory negligence, since it was not a crossing case and plaintiff was not attempting to cross the track in front of an approaching train, taking a chance of crossing before the train came.

Damages—Excessiveness.†—In an action for injuries to a child whose foot was caught in a switch in which it became fastened while he was attempting, under defendant's invitation, to cross its tracks, a recovery of \$20,000 was not excessive where plaintiff, who was a bright, intelligent boy, eight years of age, lost both his legs, one at the thigh and the other below the knee.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by Frank Simons against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court (76 N. E. 883) affirming a judgment for plaintiff, defendant appeals. Appeals from Appellate Court un-

*For the authorities in this series on the subject of the care required of minors for their own protection, see foot-notes appended to Louisville Ry. Co. v. Esselman (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627; foot-notes appended to Birmingham Ry., L. & P. Co. v. Jones (Ala.), 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568; foot-notes appended to Colomb v. Portland & B. St. Ry. (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293.

For the authorities in this series on the question whether young children can be chargeable with contributory negligence, see foot-notes appended to Chambers v. Milner Coal & Ry. Co. (Ala.), 20 R. R. R. 277, 43 Am. & Eng. R. Cas., N. S., 277.

†For the authorities in this series on the subject of the damages recoverable for injuries to, or loss of, legs or arms, see foot-notes appended to Campbell v. Railway Transfer Co. (Minn.), 22 R. R. R. 61, 45 Am. & Eng. R. Cas., N. S., 61.

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der third subdivision of section 1337j, Burns' Ann. St. 1901. Affirmed.

G. E. Ross, for appellant.

Jno. T. Strange, J. F. Charles, and Dan Dille, for appellee.

HADLEY, J. Appellant appeals from a judgment rendered in favor of appellee for personal injuries alleged to have been caused by the negligence of the appellant. The complaint was in two paragraphs, but there is no controversy but that the verdict rests upon the first. This paragraph was assailed by a motion to make more specific, and by a demurrer for want of facts, each of which was overruled and forms the basis of an assignment. The substance of the complaint is: That appellant's railroad runs north and south through the corporate limits of Gas City, parallel with, and from 600 to 800 feet east of, the Mississinewa river. Main and South H streets, in said city, run parallel, east and west, and both cross defendant's railroad at right angles. These streets and crossings are from a half to three-fourths of a mile apart, and between them are seven other parallel streets, running east and west, all of which, at the west end, abut upon the east line of defendant's right of way, but none of them crosses the railroad. South B street is the second street south of Main. The territory on both sides of the railroad is, and has been for some time, occupied by many residences and manufacturing establishments, in which latter places are, and have been for many years, employed a large number of men, women, and children, which appellant well knew. The company had a passing track, the south end of which connected with the main track about five feet north of South B street, extended, and about 600 feet south of Main street, and a switch track, known as the "American Window Glass Spur," that connected with the passing track about 125 feet north of South B street, extended and ran thence south parallel with the main track, to a point south of South B street. Beginning about 500 feet south of Main street on the right of way, on the west side of the main track, a well-defined much-used pathway began and extended southward along the west side of the railroad and within the right of way, for about one-half mile. There were three or more well-defined, much-traveled paths that led off from the first named that crossed the railroad to the east, one of which crossed the railroad right of way a few feet north of South B street, extended. In 1892 the company constructed a barbed-wire fence on the west line of its right of way, from a point 280 feet south of Main street, southward to South H street, a distance of more than one-half mile, and in constructing the fence the company erected gateposts on each side of said pathway running across the right of way at the west end of South B street, and it has ever since maintained said gateway open for travel along said pathway. No fence was maintained on the east lines of the right of way, in the vicinity of South B street, and all of said pathways were open and

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accessible to the plaintiff and the public. That between said Main and South H streets there were no public crossings over the right of way. That portion of said city between said streets was at all times thickly populated, and for the residents therein to cross the right of way upon a public crossing it was necessary to go to Main street or to South H street, a distance of from one-half to three-fourths of a mile. That said gateway was constructed and maintained for the purpose of allowing the public to travel through the same and along said pathways, and on said 9th day of March, 1903, and for many years prior thereto, said pathways and gateway had been in open and continuous use by the public, for travel, and hundreds of men, women, and children passed over the same daily, going to and from their work, and going to and from defendant's depot on business. That such use occurred at all hours of the day, and that large numbers of children were constantly passing along said pathway along said tracks at the end of South B street. That the defendant and its employees had full and actual knowledge of such facts, and especially of the custom of the children in so using said pathways, but the defendant never made any objection to such use, and did not erect any notice warning the public of danger at said crossings, but acquiesced in, and consented to, such use all of the time. That the switch or side track located near the end of South B street was connected with the main track by a switching device, which switching device was knowingly and negligently maintained and operated by the defendant in a manner extremely dangerous to persons crossing said track or on said side track and especially dangerous to children, in this: that the space between the throw rail of said switch and the west rail of said main track was not blocked, but left open in such a manner that persons crossing or upon said track would be liable to get their feet caught or fastened between said rails and be in great danger of being run over by the trains of the defendant, which are frequently being run over said track. That said switching device could have been blocked in such a manner as to have decreased or have entirely removed said danger and prevented the danger hereinafter complained of, but that it was maintained and operated in said dangerous condition with full knowledge on the part of this defendant. That in March, 1903, the plaintiff, being a boy eight years of age, of ordinary intelligence, and residing with his father on South B street, near the defendant's right of way, was sent by his parents on an errand to a house on the west side of the right of way. The plaintiff traveled westward on South B street, until he arrived at the defendant's right of way, and then entered upon said right of way, and traveled westwardly along said beaten path across said right of way and through said gateway. That the plaintiff soon afterward "returning from his errand, entered upon said right right of way through said gateway on the west side and approached said first-named switch when a locomotive engine with cars attached was backing southward on said window glass spur. That while said engine was on the window glass spur the plaintiff attempted to cross the main track on said

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pathway, and, while attempting to cross, his foot became fastened between the west throw rail of said switching device and the west rail of the said main track, the same not being blocked as above averred, and that he was unable to loosen it, but was securely fastened to said track. That said engine and cars went north on the window glass spur at a slow rate of speed and passed within ten feet of the plaintiff and then backed southward on the passing track to enter the main track towards the point where the plaintiff was fastened. That plaintiff was in full view of the employees of the defendant and could have been seen by them after his foot became fastened. That the plaintiff began to scream and cry out loudly so as to attract the attention of persons in the vicinity, and he continued to cry out until he was run over. That such cries could have been heard by the defendant's employees when they were passing along the window glass spur, and when they approached him on the passing track. That during all of said time said plaintiff's body was moving up and down in his endeavors to release himself, in such a manner as to attract the attention of the defendant's employees had they been diligent in the performance of their duties. That said engine and cars might have been stopped within a space of 30 feet, but that the employees negligently and carelessly failed to keep watch of the track ahead or be at their post of duty, but with knowledge of the dangerous condition of said premises and of the custom of the children to pass over the same, ran said engine and cars, toward the plaintiff, crushing both of his legs, which necessitated the amputation of the right below, and of the left above, the knee.

The defendant moved the court below to require the plaintiff to make his complaint more specific by stating in what respect "defendant knowingly and negligently operated said switching device * * * and knowingly and negligently maintained said switching device," and "its employees negligently and carelessly failed to keep a watch ahead," and "negligently and carelessly failed to be at their post of duty." It has often been held by this court that a general charge of negligence is sufficient as against a demurrer, but, if a defendant desires a more specific charge, he is entitled to it upon motion, if made in due season. But the rule has its limitations. A plaintiff is required to charge his cause of action in direct and certain terms, yet he is not required to go into an elaboration of details beyond what is reasonably necessary to fully and distinctly inform the defendant of what he is called upon to meet. *Alleman v. Wheeler*, 101 Ind. 141.

The first specification of negligence in the complaint is that the defendant knowingly and negligently maintained and operated at the place described a switching device that was extremely dangerous, particularly to children passing along or across the railroad track at that point, in this: that the space between the throw rail of said switch and the west rail of the main track was not blocked, but left open in such a manner that persons crossing the track at that point were liable to get their feet fastened

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therein. The second specification is that the engine and cars could have been stopped at any time within the space of 30 feet, but defendant's employees, knowing the dangerous condition of the place and the custom of children to pass over the same, negligently failed to keep watch of the track ahead of the backward-moving train, and so ran said cars toward and over the plaintiff.

The maintenance and operations of an unblocked switch knowingly at a much-frequented place, and the knowingly backing of a train over the place without looking ahead of the moving cars, constitute the negligent acts complained of, and we are at a loss to see how an amplification of details, beyond what is given in the complaint, could increase the defendant's knowledge, or strengthen it in the preparation of its defense. We, therefore, think the court did not err in overruling the defendant's motion to make the complaint more specific.

As we view the complaint, the pivotal point to the demurrer to the first paragraph is whether the facts alleged show the plaintiff to have been on the defendant's tracks, when injured, as a mere licensee or by invitation. If he was there for his own accommodation, though with the consent of the defendant, it should be held that the latter was under no legal obligation to make or keep the place safe. In such case the former would enter the premises at his own risk and enjoy his privilege with its attendant perils. *Railroad Co. v. Slaughter* (this term) 79 N. E. 186; *Lingenfelter v. Railroad Co.*, 154 Ind. 49, 55 N. E. 1021; *Railroad Co. v. Feirick*, 158 Ind. 621, 625, 64 N. E. 221. But if the owner or occupant of real estate goes beyond consent or passive acquiescence, and by positive acts, or inducements, entices others to come upon or cross his premises at a particular place, he assumes towards the persons moved by his implied invitation the duty of exercising ordinary care to construct and keep the place reasonably safe for the purpose. *Railroad Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Hansen v. Railroad Co.*, 105 Cal. 379, 38 Pac. 957; *Walker v. Winstanley*, 155 Mass. 301, 29 N. E. 518; *Elliott v. Pray*, 10 Allen (Mass.) 378, 87 Am. Dec. 653; *Flynn v. Railroad Co.*, 142 N. Y. 439, 37 N. E. 514. So, if the plaintiff was led onto the defendant's railroad, where he was injured, by such active conduct of the defendant as was reasonably calculated to induce the belief that any one having occasion to pass to the other side of the right of way was invited to cross by that particular path, then, if the appellant had not exercised ordinary care to maintain the path in a reasonably safe condition for foot travelers, it should be held liable, unless it appears that the plaintiff was at the time guilty of contributory negligence. It was said by Mitchell, J., in the *Griffin Case*, *supra*: "An owner may not, by invitation, either express or implied, induce another to come upon or pass over his premises without keeping them in such condition of safety as to admit of his passing over by the means designated or prepared, without injury, provided he uses due care." The status of the plaintiff on the railroad at the time of his injury is, therefore, an important and

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material inquiry. From the course of the evidence, it is apparent that the case rests upon the theory that the plaintiff was on the premises by the implied invitation of the defendant. Whether this theory is maintainable under the facts and circumstances of this case is generally and properly held to be a question for the jury, to be determined from all of the evidence and legitimate inferences that may be drawn from the facts proved. *Gilbert v. Nagle*, 118 Mass. 278; *Taylor v. Canal Co.*, 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446; *Scott v. Railroad Co.*, 112 Iowa 54, 83 N. W. 818; *Hansen v. Railroad Co.*, 105 Cal. 379, 38 Pac. 957; *Phillips v. Library Co.*, 55 N. J. Law 307, 27 Atl. 478; *C. B. & Q. R. R. Co. v. Murowski*, 179 Ill. 77, 53 N. E. 572; *Atchison, etc., R. R. Co. v. Cross*, 58 Kan. 424, 49 Pac. 599.

It may also be observed that the facts involved are free from any substantial conflict, and practically the same as averred in the complaint, so that their review will dispose of the question relating to both the sufficiency of the complaint and of the evidence to support the verdict. It is shown that appellant's railroad runs north and south through the body of Gas City, and from Main to South H street, a distance of more than half a mile, is without any established street or other highway crossing over the railroad, though seven intervening streets coming from the east abut against the east line of the right of way. The territory on both sides of the railroad, for the entire distance, is thickly populated and occupied with many manufacturing establishments. Prior to 1893 persons desiring to pass from one side of the railroad to the other sought the most convenient place, and, as a result of such elective crossing and travel on the railroad, in 1893 there was on the west side of the railroad right of way, running parallel with the track, a well-worn and beaten path more than a half mile in length, and at divers other places in the distance described were other well-beaten paths crossing the right of way, or putting off from the parallel path to the east or to the west. One of these well beaten paths left the end of South B street where the same abutted against the right of way, and running thence westward, crossed the track and right of way a few feet north of the north line of B street, if extended. In 1893 the railroad company constructed a wire fence along the western line of its right of way from a point 280 feet south of Main street to South H street, a distance of between one-half and three-fourths of a mile, and in making the fence, upon the request of a resident of the west side, the company erected posts on either side of the path running westward from South B street, across the right of way, and thereby constructed an open gateway across the path at that point, which fence and gateway, from the date of construction, the company continued to maintain at the time of the plaintiff's injury. Many persons, as one witness testified. "Hundreds of men, women and children passed daily through said gateway and across the right of way on said path," into South B street, with the knowledge of the defendant, said path crossing the track at the point where the plaintiff was in-

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jured. It may be said that the company, in the construction of the fence, had some object in view. It could not have been to restrain animals from going onto the right of way. There was no fence on the east side of the road, no cattle guards, and nothing to prevent stock from passing through the gateway and around the ends of the fence at Main and South H streets. It may be said that it was objectionable to the company for the residents along its road to wander promiscuously and at random across the railroad on errands to and from their work, and that it erected the fence as a means of enforcing its discontinuance, and it is not improbable that, while engaged in constructing the fence, the company realized that the people of the city had an ample remedy to preserve their privileges in crossing the railroad by forcing public street crossings, and that it was the part of wisdom to provide some reasonable and less objectionable way across, and thereby escape the expense of public crossings, and the odium of forcing persons to go a fourth of a mile or more around one end of the fence or the other. The gateway was constructed in a direct line to the business part of the city and at a place acceptable to the citizens, as was shown by the previously worn and beaten path. The gateway had been much used for 10 years, and many people had been passing through it daily, with the knowledge of the company and without any objection or sign of disapproval. These facts, and circumstances and inferences that naturally and properly arise therefrom, were proper subjects for the consideration of the jury, and we are unable to say that it was not warranted in finding that the company constructed and maintained the open gateway as an implied invitation to all persons desiring to go to the other side of the railroad, to come that way, and that the plaintiff, even though regarded as an adult, having resided in the immediate neighborhood for years, had the right to act upon appearances, and rely upon the belief that he had the right to pass that way. As was said in *Railroad Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121: "An implied invitation may be inferred from some act or line of conduct, or from some designation or dedication." See a large number of cases collected at page 408 of 115 Ind., page 125 of 16 N. E.; 3 Elliott on Railroads, §§ 1248, 1249, 1250. It is a well-established rule that an invitation may also be inferred where it appears that there is a common interest or mutual advantage in the entry, while a license should be inferred where the object is the mere accommodation or benefit of the person using it. Accepting this doctrine in its fullest sense, we see, in the facts of this case, nothing incompatible with a finding of invitation from mutual advantage. If, by erecting and keeping the gateway open, the company satisfied the citizens, and was thereby enabled to maintain a barbed-wire fence through the city for more than a half mile, and prevent promiscuous crossing of the railroad over that distance, without providing public street crossings as might fairly be presumed, then it cannot be said that the company was without benefit and advantage accruing from the maintenance of the gateway, and, taken in connection with the 10 years of fre-

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quent use, under the notice and without objection from the company, we have a state of facts which presents at least sufficient evidence to sustain a verdict that the plaintiff was on the track by inducement or implied invitation. *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22; *Nichols' Adm'r v. Railroad Co.*, 83 Va. 99, 5 S. E. 171, 5 Am. St. Rep. 257; *Taylor v. Delaware, etc., Co.*, 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446; *Davis v. Railroad Co.*, 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; *Byrne v. New York, etc., Co.*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512; *Railroad Co. v. Murowski*, 179 Ill. 77, 53 N. E. 572; *Graves v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727.

It is shown that appellant was guilty of negligence? Assuming that appellee was on the track, when injured, by invitation, and that he was rightfully there in an effort to cross the railroad by the gated path, it follows that we must also assume, as a matter of law, that the company, by the invitation, took upon itself the duty of observing ordinary care in constructing and in keeping the way for footmen, and reasonably safe for those who should act upon the invitation, and a failure to discharge this duty to one entitled to protection, to his injury, will constitute actionable negligence. The negligence charged is the failure to block the frog of the passing switch that lay in the path in controversy, well knowing its dangerous condition, and that a large number of persons, including children, passed over it daily, and also the backing of the cars over the plaintiff, as he was held fast on the track in the switching device, without looking ahead of the backing cars, and without taking any precaution to avoid injuring the plaintiff, or other persons, that might by chance be upon the track, at the point in question. It cannot be said that failure to block a frog, or other dangerous parts of a switching device, is negligence per se, even though such blocking is practicable and will render such place safe. Railroad companies have large latitude in the selection of their methods of doing business upon their own private grounds, and, if it is a part of the company's general plan to leave its switches unblocked, and such a custom is approved and observed by other well-managed railroads, the danger commonly flowing from such unblocked points is generally held to be one of the risks assumed by employees. But there are many exceptional situations, such as affect the public, or expose employees to such unusual perils that they cannot be regarded as assumed. *Railroad Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155. Each case must stand upon its own facts, and whether it was negligence to leave the frog unblocked at the place where the plaintiff was injured, taking into account the classes and the number of pedestrians that passed over it, and whether, under the facts, it was negligence in the defendant to send the cars back upon the plaintiff without a lookout, was properly sent to the jury. *Friess v. Railroad Co.*, 67 Hun. 205, 22 N. Y. Supp. 104, affirmed 140 N. Y. 639, 35 N. E. 892; *Spooner v. Railroad Co.*, 115 N. Y. 22, 21 N. E. 696; *Brown v. Railroad Co.*, 15 Phila. R. 321; *Harriman v. Railway Co.*, 45 Ohio St. 11,

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12 N. E. 451, 4 Am. St. Rep. 507. Counsel insists that appellant is liable to one who comes upon its premises by invitation, express or implied, only when the injury is occasioned by an unsafe condition, known to the company, and not known to the injured party, and that it is not liable for injuries resulting from a dangerous condition known to both, or that was open and obvious to all comers. The rule contended for, if indeed it can be called a rule, is not applicable to the facts in this case. The contention can only be sustained upon the theory that the plaintiff, with full knowledge and appreciation of the danger, voluntarily encountered it, and thereby took upon himself the risk incident thereto. *Oil Co. v. O'Brien*, 160 Ind. 273, 65 N. E. 918, 66 N. E. 742. There is nothing in this case to show that the plaintiff either knew or appreciated the danger. He was a child, eight years of age, and we cannot presume that he had even noticed the unblocked frog, or if he had, that he appreciated the danger of becoming fast in it. See *Goodrich v. Railway Co.*, 103 Iowa 412, 72 N. W. 653.

Appellee was permitted to answer, over objection, the following question: "You may tell the jury whether you could have got across the track when you started across before the train got down there if your foot had not got caught. Answer: Yes, sir." While this question, strictly speaking, may not have been a proper question, the action of the court in permitting it to be asked and answered is not reversible error. This is not a crossing case. Appellee was not attempting to cross the track in front of an approaching train, and took the chances of getting across before the train came. If appellee was attempting to cross the track at a place where he had a right to cross it, there is no evidence in the case tending to show that he was guilty of any contributory negligence.

The court very fully instructed the jury upon the rights of a licensee and also upon the right of a person upon the premises of another through an implied invitation. Whether appellee was upon appellant's track at the time of his injury through an implied invitation was properly submitted to the jury. The instructions given fully covered all the material questions in the case, and correctly stated the law. What we have already said upon the question of inducement or implied invitation is applicable to the principal objections made to certain instructions. Taking the instructions as a whole, they were not prejudicial to appellant's right.

Excessive damages is urged as a cause for reversing the judgment. The recovery was \$20,000. The plaintiff was a bright, intelligent boy, eight years of age. He lost both of his legs, one in the thigh, the other below the knee. The jury, under a proper instruction, have determined the amount as being a reasonable compensation and, we do not feel warranted in disturbing it.

Judgment affirmed.

SERANO v. NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, April 2, 1907.)

[80 N. E. Rep. 1025.]

Negligence—Imputed Negligence—Parent and Child—Railroads—Question for Jury.*—In an action by a child for injuries sustained in being struck at a railroad crossing, held, under the evidence, that it was not negligence as a matter of law for the child's parents to permit it to go into the street unattended.

Same—Contributory Negligence—Care Required by Children—Negligence of Parents.—Where a child in crossing a railroad track exercises the degree of care that an adult would under the same circumstances, the suggestion of negligence on the part of the parents imputable to the child is wholly negatived.

Railroads—Accidents at Crossings—Negligence—Questions for Jury.†—In the absence of signals or safeguards by way of gates or flagmen, a speed of from 15 to 25 miles an hour by a railroad train around a very abrupt curve at a much used crossing in a city is some evidence to submit to a jury on the question of defendant's negligence.

Negligence—Contributory Negligence—Children—Degree of Care Required.‡—A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is required of an adult under like circumstances, but is only required to exercise such care and prudence as is commensurate with one of its age and intelligence.

Appeal—Review—Questions of Fact.—The Court of Appeals cannot consider questions as to weight of evidence or relating to an excessive verdict.

Railroads—Accidents at Crossing—Question for Jury.—In an action for injuries sustained by a child in being struck at a railroad crossing, held whether the child was guilty of contributory negligence was for the jury.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Annie Serano, an infant, by Michael Serano, her guardian ad litem, against the New York Central & Hudson River

*As to what constitutes contributory negligence on the part of parents, in actions for injuries to children, see foot-notes appended to *Cameron v. Dulouth-Superior Traction Co.* (Minn.), 14 R. R. R. 632, 37 Am. & Eng. R. Cas., N. S., 632; *Nashville R. R. v. Howard* (Tenn.), 14 R. R. R. 75, 37 Am. & Eng. R. Cas., N. S., 75; *Richmond, etc., R. Co. v. Martin's Adm'r* (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435.

†See foot-notes appended to *Golinvaux v. Burlington, C. R. & N. R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185; *Norris v. New York, etc., R. Co.* (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.

‡See preceding case, and foot-notes.

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Railroad Company. From an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, which reversed an order of a Trial Term (99 N. Y. Supp. 1103, 114 App. Div. 684) denying defendant's motion for a new trial after a verdict in favor of plaintiff, and granted a new trial, plaintiff appeals. Order of the Appellate Division reversed, and judgment entered upon the verdict affirmed.

Udelle Bartlett, for appellant.

Henry Purcell, for respondent.

CHASE, J. On the 29th day of December, 1902, the plaintiff was struck at the Willow street crossing, in the city of Oswego, by a locomotive attached to a passenger train owned and operated by the defendant. At the time of the accident she was less than six years of age. She brings this action to recover damages for her personal injuries. The fact that an accident occurred is not disputed, but the extent of the plaintiff's injuries and the responsibility of the defendant therefor is denied. The action has been tried twice. On the first trial the plaintiff recovered a verdict. The judgment entered thereon was reversed by the Appellate Division and a new trial ordered, "upon the ground that the verdict of the jury was against the weight of the evidence"; one of the judges concurring in the result "only upon the ground that the finding of the jury that the defendant was negligent was against the weight of the evidence." *Serano v. N. Y. C. & H. R. R. Co.*, 102 App. Div. 621, 92 N. Y. Supp. 1145. On the second trial the plaintiff again recovered a verdict. On appeal from the judgment entered thereon the Appellate Division, by a divided court, reversed the judgment and ordered a new trial, "upon questions of law only, the facts having been examined and no error found therein." 114 App. Div. 684, 99 N. Y. Supp. 1103. The effect of such an order was considered by this court in *Albring v. N. Y. C. & H. R. R. Co.*, 174 N. Y. 179, 66 N. E. 665, in which case the court say: "This order * * * means * * * that the Appellate Division reached the conclusion after examining all the evidence that the jury were justified in accepting as true in all instances of conflict in testimony that which was most favorable to the plaintiff, and yet it could not permit the judgment to stand because that most favorable view of the testimony fell short of supporting the judgment."

This court, as said in the case last mentioned, can review the questions of law that were before the Appellate Division. Our review is confined to such questions. The plaintiff is the child of poor parents, who for three or four years prior to the accident lived a short distance from the crossing where the accident occurred. She was an intelligent child, and had attended school for about one year prior to the accident. She had been accustomed to cross the tracks of the defendant's road without attendants, and to play with other little girls in the locality of the crossing. She had been told by both her father and mother that in crossing the railroad tracks she should be very careful and look up and down the tracks before crossing to see if a train was coming.

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It was not negligence as a matter of law for plaintiff's parents to permit her to go into the street. *Huerzeler v. Central C. T. R. R. Co.*, 139 N. Y. 490, 34 N. E. 1101. Her parents seem to have regarded her as possessing sufficient discretion so that she could go to school and upon errands and to play in the streets unattended. She had sufficient mental and physical capacity so that prior to the day in question she had avoided accidents. The plaintiff was not sworn on the trial, and the record does not disclose why she was crossing the defendant's tracks at the time when the accident occurred. The mother testified that plaintiff left the house 10 or 15 minutes before the time when she was brought to the house after the accident. At the crossing in question the defendant has east and west bound tracks. The general direction of the tracks is east and west, and Willow street crosses the tracks so as to make the southeasterly angle of the street line with the tracks about 58 degrees. The locomotive that hit the plaintiff was going west on the west-bound, or northerly, track. The tracks east of the crossing curve sharply to the right, and there is a bank with fences and buildings adjoining the railroad tracks on the south. The curve of the defendant's road is such that with an otherwise unobstructed view the engineer sitting on the box on the right side of his locomotive cannot see the crossing until within about 40 feet of the same, and the fireman sitting on the box on the left side of the locomotive, which is the inside of the curve, cannot see the crossing until within about 100 feet of the same. It is not claimed that the whistle of the locomotive was blown until a moment before the accident, when it was blown at the same time that the emergency brakes were applied.

The defendant claims that the bell had been ringing automatically since the train left the Oswego station, about one-half mile east of the crossing where the accident occurred. An east-bound train had passed over the southerly track of the defendant's road a moment before the accident. The engineer on the west-bound train testified that the locomotives of the two trains passed about 100 or 200 feet east of Willow street, and other witnesses confirm his estimate. The defendant claims that the plaintiff was not at the Willow street crossing, but that she was on the defendant's right of way, walking between the rails on the west-bound track, about 10 to 25 feet east of the crossing, and that the engineer and fireman of the defendant's west-bound train saw the plaintiff on the tracks as stated, facing west, when their locomotive was within 20 or 25 feet of the plaintiff, and that the train was then stopped as quickly as possible, and that the plaintiff as she was stepping off the track was struck by the locomotive and thrown into Willow street. Two other witnesses for the defendant corroborated the defendant's contention.

Five witnesses for the plaintiff testified that the plaintiff was on the easterly sidewalk of Willow street, going towards the crossing, and that, when she arrived within a few feet of the east-bound track, she stopped and waited for the east-bound train to pass, and when it had passed so that the rear of the train was from 12

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to 75 feet east of the crossing she proceeded across the tracks. The distance between the east and west-bound tracks is 8 feet. One witness for the plaintiff, who saw the accident, testified that the plaintiff walked slowly, and, when she came to the middle between the east-bound and west-bound tracks, that she looked both ways, and that, when she came to the last track, she looked the way from which the train was coming, and was then struck. Another witness for the plaintiff, who saw the accident, testified that after the east-bound train had passed about 75 feet the plaintiff looked east, and started across the track, and was then struck.

The defendant's engineer and fireman and 11 other witnesses, all of whom were on the train, with two exceptions, and 8 of whom were defendant's employees, testified that the bell on the locomotive was rung. The plaintiff produced five witnesses who were in the vicinity of the crossing, who testified, in substance, that they were in a position where they could hear the bell if rung and that they listened for it, but it was not rung, and that no signal of any kind was given. Other witnesses for the plaintiff testified that they did not hear any signals. Eleven witnesses for the defendant, all but two of whom were upon the train, and the majority of whom were the defendant's employees, testified that the train was running at a speed of from six to eight miles an hour. The plaintiff produced four witnesses, each of whom were in a position where they could observe the train, and one of them testified that the train was running 15 miles an hour; one that it was running 20 miles an hour; and two that it was running from 20 to 25 miles an hour. The train was running upgrade, with only 12 or 15 passengers, and the emergency brakes were fitted to all of the wheels of the train and the train was stopped, as the jury could have found, in about 220 feet from where the brakes were first applied.

One other fact that the jury could have considered in determining the defendant's negligence and the plaintiff's freedom from contributory negligence relates to the steam and smoke from the east-bound train that it is claimed concealed the west-bound train. Defendant's engineer testified, in referring to his seeing the plaintiff on track: "I couldn't see her sooner because there was a very sharp curve there. The curve and the approaching train—some steam from the approaching train—but the curve had the most to do hiding my view from her." And he further testified: "I saw steam from the other engine, the east-bound engine, as I approached the Willow street crossing, and this girl; it settled; it blew across the west-bound tracks. It cleared up as we approached the girl." The baggage man, who, after the danger signal was given, opened the door of his baggage car on the left-hand side and looked towards the locomotive of his train, testified: "Observed nothing on account of the smoke and steam escaping from the train that we met there." A passenger referring to the east-bound train said: "I didn't see the east-bound train, because the steam and smoke came in between the trains." And another that "the smoke and steam from that train going down

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the east-bound interfered with my view ahead prior to my seeing the girl and the curve itself." Of the two witnesses sworn for the defendant who were not on the train, one, who was west of the crossing, testified: "When the east-bound train went by, there was smoke and steam from that point." And the other, who was on the west side of the crossing, testified, referring to the girl and how she was dressed: "I couldn't tell at that time, the smoke and steam from the other train was coming down."

All the questions involved in the trial, including the question as to whether the plaintiff was *sui juris* or not, and as to the imputed negligence of the plaintiff's parents, were left to the jury in charge to which, except as hereafter mentioned, there was no exception, and in which the court granted all of the numerous requests to charge made by the defendant's counsel. The defendant excepted to a statement by the court that, if the jury found that the plaintiff exercised such care as is required of an adult under similar circumstances, that any negligence on the part of the parents was not imputable to the child, and to the charge of the court that if the jury found the speed of the train was from 15 to 25 miles an hour, and they also found that to be a dangerous and excessive rate of speed in the locality of this crossing, that they might then find the defendant guilty of negligence. We find no error in the charge of the court. If a child is capable of exercising the care that is required of an ordinarily prudent person of full age, and such child does exercise such care, the suggestion of negligence on the part of the parents imputable to the child is wholly negatived. The imputed negligence of the parents is wholly based upon the inability of the child to exercise the care and prudence of an adult.

In the absence of signals or safeguards by way of gates or flagmen, a speed of from 15 to 25 miles an hour around a very abrupt curve at a much-used crossing in a city is some evidence to submit to a jury on the question of defendant's negligence. *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362, 54 N. E. 785.

A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence. *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362, 54 N. E. 785; *Costello v. Third Ave. R. R. Co.*, 161 N. Y. 317, 55 N. E. 897; *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 620; *McGoven v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421; *Thurber v. Harlem B., M. & F. R. R. Co.*, 60 N. Y. 326; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377.

The opinion of the court in the Appellate Division concedes that the record discloses a conflict of fact upon all the questions involved between the parties, except the question as to whether the plaintiff was guilty of contributory negligence. In its opinion, referring to the defendant's negligence, the court say that "by far

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the greater weight of evidence is to the effect that the speed was not excessive, and that the bell was ringing as the train approached the crossing." And, also, referring to the amount of the verdict, the court say: "The verdict for the plaintiff on the first trial upon the same evidence as to damages was \$600, and upon this \$5,000. It is grossly excessive." The evidence on the former trial is not before us, but even if it were, and we were inclined to agree with the Appellate Division as to the weight of the testimony relating to the defendant's negligence, and as to the amount of the verdict, this court cannot consider the weight of evidence or questions relating to an excessive verdict. *Dimon v. N. Y. C. & H. R. R. Co.*, 173 N. Y. 356, 358, 66 N. E. 1. As we have stated, we can only consider whether the reversal of the judgment entered upon the verdict should be sustained as a matter of law. We cannot agree with the Appellate Division in holding as a matter of law that the plaintiff was guilty of contributory negligence. In view of the plaintiff's age, the peculiar danger arising from the abrupt curve in the defendant's road, the noise and confusion produced by the east-bound train, the extent to which the view to the east was obscured by the train going east, and the smoke and steam therefrom, it made the plaintiff's negligence under all the circumstances and testimony disclosed by the record, a question of fact which was properly submitted to the jury.

The distinction between the facts in this case and those in cases like *Weiss v. Metr. Street Ry. Co.* 33 App. Div. 221, 53 N. Y. Supp. 449, affirmed 165 N. Y. 665, 59 N. E. 1132, *McCarthy v. N. Y. C. & H. R. R. Co.*, 37 App. Div. 187, 55 N. Y. Supp. 1013, and *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420, is apparent upon their recital. There was some evidence upon each of the questions at issue which required that all of the issues involved in the action be submitted to the jury for their determination.

We have examined the exceptions to the admission and rejection of evidence, and do not find any error in the rulings of the court which justified the reversal by the court below.

The order of the Appellate Division should be reversed and the judgment entered upon the verdict affirmed, with costs in all the courts.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, and WILLARD BARTLETT, JJ., concur. GRAY and HISCOCK, JJ., not sitting.
Judgment reversed, etc.

CENTRAL OF GEORGIA RY. CO. *v.* MARTIN.

(Supreme Court of Alabama, April 11, 1907.)

[43 So. Rep. 563.]

Railroads—Dog Killed on Track—Liability of Company.*—That the owner of a dog knowingly permits it to go upon a railway track will not preclude recovery for its death, caused by the company's negligence.

Appeal from Circuit Court, Russel County; A. A. Evans, Judge.

Action by C. O. Martin against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. L. Comer, for appellant.

Frank M. De Graffenreid, for appellee.

TYSON, C. J. This action was brought to recover damages for the negligent killing of plaintiff's dog by one of the trains of the defendant. The only assignment of error is predicated upon the ruling of the court holding the defendant's special plea to be bad. The facts averred in the plea may be stated to be these: That on the day the dog was killed the plaintiff and his dog had gone along the track of the defendant's railroad in a westerly direction for about one mile, and after traversing this distance the plaintiff turned around, the dog accompanying him, and retraced his steps along the track of the defendant's road, "and by reason of the said acts and conduct of said plaintiff the said dog was put in a perilous position on and along said railroad track and the right of way of said railroad, and by reason thereof the said dog of the plaintiff was run over and killed by one of the trains of said defendant which passed along said railroad, and defendant says that by reason of said conduct of the plaintiff the said defendant is not liable for damages," etc.

It will be noted that there is no denial of the negligence alleged in the complaint, or that plaintiff intentionally put his dog in a perilous position on the track. It seems to assert broadly that, because plaintiff was a trespasser upon the defendant's track and knowingly permitted his dog to be upon the track, by reason of that fact, notwithstanding the negligence of defendant's trainmen, he should not be allowed to recover. The plea, in our opinion, was clearly bad. The point seems to have been directly ruled in the case of *S. L. A. & Texas Ry. Co. v. Hauks*, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383. And this is in line with the uni-

*For the authorities in this series on the subject of the care due from trainmen to avoid running over dogs, see foot-notes appended to *Fowles v. Seaboard Air Line Ry. (S. Car.)*, 20 R. R. R. 510, 43 Am. & Eng. R. Cas., N. S., 510.

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form holding of this court that the acts and conduct of the owner of animals, in permitting them to run at large and trespass on the tracks of the railroad, will not preclude him from recovering for the injury done them. *A. G. S. R. R. Co. v. Powers*, 73 Ala. 244, and cases there cited.

Affirmed.

DODWELL, ANDERSON, and McCLELLAN, JJ., concur.

OSTEEN v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina, March 25, 1907.)

[57 S. E. Rep. 196.]

Railroads—Accident at Crossing—Question for Jury.*—The question whether plaintiff's intestate killed at a crossing was guilty of contributory negligence in failing to look and listen was for the jury.

Same—Evidence.—Though plaintiff's intestate killed at a railroad crossing was hard of hearing, it was proper to admit evidence that no signals were given at the crossing.

Trial—Instructions.—The refusal of an instruction covered by those given was not error.

Railroads—Accident at Crossing—Signals.—In an action for injuries at a crossing where there was evidence of negligence on both sides, it is not error to instruct the jury to consider whether the failure to give the statutory signals was the cause of the accident, though the person injured saw the approaching train.

Same—Duty of Traveler.†—Where a deaf man approaches a railroad crossing, he is only required to look to the extent necessary for the exercise of due care.

Constitutional Law—Due Process of Law.‡—Act 1902 (23 St. at Large, p. 1071), allowing punitive damages in actions for negligence of

*See foot-notes appended to *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739; foot-notes appended to *Bamberg v. Atlantic Coast Line R. Co.* (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; foot-notes appended to *Norris v. New York, etc., R. Co.* (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.

†For the authorities in this series on the subject of the contributory negligence of deaf persons in walking on or crossing railroad tracks, see foot-notes appended to *McKeown v. South Carolina & Georgia Ex. R. Co.* (S. Car.), 13 R. R. R. 71, 36 Am. & Eng. R. Cas., N. S., 71; *Portsmouth St. R. Co. v. Peed's Adm'r* (Va.), 13 R. R. R. 65, 36 Am. & Eng. R. Cas., N. S., 65.

‡For the authorities in this series on the subject of the constitutionality of statutes prescribing penalties to compel railroads to perform their duties to the public, see foot-notes appended to *American Exp. Co. v. Southern Ind. Exp. Co.* (Ind.), 21 R. R. R. 425, 44 Am. & Eng. R. Cas., N. S., 425; *State v. Great Nor. Ry. Co.* (Wash.), 21 R. R. R. 184, 44 Am. & Eng. R. Cas., N. S., 184.

For authorities in this series on the subject of the police powers of a state over railroad companies, see foot-notes appended to *State v. Great Northern Ry. Co.* (Wash.), 21 R. R. R. 184, 44 Am. & Eng. R. Cas., N. S., 184; *McGuire v. Chicago, etc., R. Co.* (Iowa), 21 R. R. R. 390, 44 Am. & Eng. R. Cas., N. S., 390.

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a railroad company, is not unconstitutional as a taking of property without due process of law.

Death—Right of Action—Punitive Damages.—An action under Civ. Code 1902, §§ 2851, 2852, for wrongful death is a new cause of action, and not a survival of an action accruing to deceased, and authorizes exemplary damages where the wrongful negligence was the result of willfulness or malice.

Railroads—Accident at Crossing—Punitive Damages.—In an action under Civ. Code 1902, § 2139, providing that railroad companies shall be liable for injuries received unless the person injured was guilty of gross or willful negligence contributing to the injury, for violation of section 2132, relating to signals at crossings, the jury may give punitive damages.

Railroads—Accident at Crossing—Instructions.—An instruction that gross negligence is the absence of slight care, and, if at the time of a collision at the crossing the deceased did not exercise slight care to avoid collision, and such negligence contributed to his injury, plaintiff could not recover, covers the proposition that willful negligence on the part of the deceased would be a defense to an action for willful failure to give statutory signals at a crossing.

Appeal from Common Pleas Circuit Court of Kershaw County; Hydrick, Judge.

Action by Henrietta Osteen against the Southern Railway, Carolina Division. Judgment for plaintiff. Defendant appeals. Affirmed.

The following are defendant's exceptions:

"(1) Excepts because his honor erred in refusing defendant's first request to charge, which was as follows: 'The evidence in this case shows beyond controversy that the deceased drove upon the railroad track without looking, and that he was hard of hearing. Such being the undisputed evidence, I charge you that the deceased failed to exercise the care required of him by law, and your verdict must be for defendant.' Said request, it is submitted was correct as to the law and the evidence, and his honor should have charged the jury as therein requested.

"(2) Excepts because his honor erred in refusing defendant's second request to charge, which was as follows: 'The law requires a traveler who knows that he is about to cross the track of a railroad to look and listen for approaching trains before attempting to cross, and that he must do this at such a distance as will enable him to stop, in case he hears or sees an approaching train. Sou. Ry. v. Carroll, 138 Fed. 641, 71 C. C. A. 88; S. & R. on Negligence, 746. The evidence in this case being undisputed that the deceased failed to do this, I charge you, as a matter of law, that your verdict must be for the defendant.' Said request, it is submitted, was correct as to the law and the evidence, and his honor should have charged the jury as therein requested.

"(3) Excepts because his honor erred in refusing defendant's third request to charge, which was as follows: 'The undisputed evidence in this case shows that the deceased, after reaching a

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point 12 to 20 feet from the railroad track, had an unobstructed view of the approaching train for a distance of at least 120 feet, and, it being a physical impossibility for the deceased to have looked and not seen the approaching train, and from the undisputed evidence it appearing that, if he had looked, he could have kept off the track and prevented the accident, I charge you as a matter of law that the deceased failed to exercise the care required by law, and plaintiff cannot recover in this action.' Said request, it is submitted, was correct as to the law and the evidence, and his honor should have charged the jury as therein requested.

"(4) Excepts because his honor erred in refusing defendant's fourth request to charge, which was as follows: 'If you should find from the evidence, if there be such evidence, that the deceased was hard of hearing, or deaf, and could not hear the approach of the train, then it matters not whether the railroad company gave the signals required by the statute, because the object of giving signals is to give notice to persons wishing to cross, who can hear them.' Whereas, the request contained a correct proposition of law applicable to the case, and should have been charged; and its refusal was to defendant's prejudice.

"(5) Excepts because his honor erred in refusing to charge defendant's ninth request, which was as follows: 'If you should find that the crossing in question is more hazardous than an ordinary crossing, on account of the trees and shrubbery referred to, then I charge you that this fact required the deceased to use more care than he would have used at an ordinary crossing. The greater the danger at a public crossing, the greater the degree of care to be used by the person attempting to cross the railroad track.' It is respectfully submitted that this request contained a correct proposition of law applicable to the facts of this particular case, and its refusal was to defendant's prejudice.

"(6) Excepts because his honor erred in refusing to charge defendant's tenth request, which was as follows: 'If one sees or hears an approaching train in time for him to keep from getting on the railway track in front of such train, it is his duty to stop before entering upon such track; and if he fails to do this and undertakes to go upon or across such track in front of the engine, and by reason of this is struck, he (or in case of his death his administrator) cannot recover damages on account of such injury for failure to ring the bell or sound the whistle, even though the statute required such a signal at such place, and even though the bell was not rung or the whistle blown, as the statute requires.' And in modifying the same by charging: 'The requirement of the statute that the bell shall be rung or the whistle blown is intended to give warning of the approach of a train, and unless the failure to ring the bell or blow the whistle contributes to the injury as the proximate cause of it (in the words of the statute, which I will read to you directly), of course, the failure to ring the bell or blow the whistle cannot be said to have made any difference; but, if it did, no matter for what cause, then the party would have

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the right to take advantage of the signals—I mean, or whatever, advantage the giving of those signals would amount to, in whatever way it might arise.’ The modification deprived the defendant of the specific charge desired—that, if plaintiff’s intestate saw or heard the train in time to keep off the track, the failure to give the statutory signal would not allow a recovery on the statutory cause of action. The purpose of such signal being to give notice of the approach of the train, if plaintiff’s intestate saw or heard it in time to prevent the accident, there could be no recovery under the statute. The benefit of this proposition was denied.

“(7) Excepts because his honor erred in refusing to charge defendant’s twelfth request, which it is submitted contained a correct proposition of law, applicable to this case. Said request being as follows: ‘The traveler is required to give way to any train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety.’

“(8) Excepts because his honor erred in refusing to charge defendant’s fourteenth request, which is as follows: ‘If you find from the evidence that the deceased was hard of hearing, or deaf, then I charge you that he was required, under the law, to be more vigilant in the use of his eyes.’ And in modifying the same by charging: ‘If due care required him to be so. That is all he is required to exercise—due care, and whatever that required him to do he is bound to do.’ Said request as submitted contained a correct proposition of law applicable to the case, and should, therefore, have been charged. The modification destroyed the entire effect of the request, and was calculated to mislead the jury as to the proposition therein requested.

“(9) Excepts because his honor erred in refusing defendant’s seventeenth request to charge, which contained a correct proposition of law, applicable to the case. Said request was as follows: ‘The fact that a person injured at a railroad crossing relied on the ringing of the bell or the sounding of the whistle (signals usually given at the crossing) will not excuse his failure to look and listen, since the obligation to use care was equally imposed on each, and the negligence of one would not excuse the other.’

“(10) Excepts because his honor erred in refusing to charge defendant’s nineteenth request, which contained a proper construction of the act therein referred to, said request being as follows: ‘So much of the statute, approved February 27, 1902 (23 St. at Large, p. 1071), as allows punitive damages, is in contravention of the Constitution of this state and the United States, in that it deprives the defendants of their property and turns it over to strangers without due process of law.’

“(11) Excepts because his honor erred in charging the jury as follows: ‘But if you find the defendant was negligent, and the contributory negligence of Osteen does not defeat her right to recover, you will compensate for her injury. In doing so, you take into consideration the age of her intestate, his earning capacity, his expectancy of life. Common sense and reason will teach

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you, as a rule, that the value of lives are different, depends somewhat on the length of time a man is expected to live and his capacity to earn money, and the value of his life to his family. You also will take into consideration the wounded feelings, grief, and sorrow and mental anguish of his widow and children, and give plaintiff such sum as in your honest, wise judgment you think is proportioned to the injury resulting from the death of Mr. Osteen to the injury sustained; and in not restricting the amount of punitive damages in proportion to the injury sustained by the parties from whom and for whose benefit the action was brought; such construction being in violation of article 14, § 1, of Amendments to the Constitution of the United States, and article 1, § 5, of the Constitution of the state of South Carolina.’”

“(14) Excepts because his honor erred in refusing to charge defendant’s twentieth request, which was as follows: ‘There is no evidence in this case tending to show willfulness, wantonness, or recklessness on the part of the defendant, and I charge you that you can only find actual damages, if you find anything, for the plaintiffs’—whereas it is submitted that the evidence warranted the charging of this request.

“(15) Excepts because his honor erred in charging the jury on the subject of punitive damages, in this: that one of the causes of action on which the plaintiff sought to recover was under section 2139 of the Civil Code of 1902, for violation of section 2132, and the jury was authorized to give punitive damages to the plaintiff if the railroad company had willfully violated said section 2132—whereas it is submitted that, under section 2139 of the Civil Code of 1902, only actual damages can be recovered for a violation of section 2132.

“(16) Excepts because his honor erred in charging the jury as follows: ‘But, if you willfully and wantonly injure me, the law says then, though I might have been negligent to such an extent that my negligence contributed to the injury, but if it was due to your wantonness or recklessness, the law says that my contributory negligence shall not be a defense against your willful, wanton, reckless disregard of my rights’; and further, ‘I have told you if you find the Southern Railway, to the parties for whom and whose benefit this action is brought. If you find from the testimony that the Southern Railway Company was also guilty of reckless, willfull, wanton disregard of his rights, then you will add to that sum such amount as you think they ought to be required to pay as punishment for their wantonness’—whereas, under the statute (23 St. at Large, p. 1071), the jury can only give exemplary damages ‘where such wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought’; and cannot give such amount as the jury think the defendant ought to be required to pay as punishment for their wantonness, without reference to the injury resulting to the parties for whose benefit the action was brought.”

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“(12) Excepts because his honor erred in charging the jury: ‘If you find from the testimony that the Southern Railway Company was also guilty of reckless, willful, wanton disregard of his rights, then you will add to that sum’ (the actual damages) ‘such amount as you think they ought to be required to pay as punishment for their wantonness.’ Such charge allowed the jury to assess such damages as they might think necessary to punish the defendant without reference to the injury sustained by the parties for whom and for whose benefit the action was brought, whereas the statute (23 St. at Large, p. 1071) limits the damages to be given by the jury in proportion to the injury sustained by said parties.

“(13) Excepts because his honor erred in construing the act entitled ‘An act to amend section 2852 of the Code of Laws of South Carolina, 1902, relating to the persons for whose benefit civil actions for wrongful acts causing death may be brought,’ approved February 27, 1902 (23 St. at Large, p. 1071), ‘to allow the jury to give punitive damages without reference, though its agent or servant was guilty of willful, wanton, reckless disregard of his rights, why, then, the doctrine of contributory negligence does not apply, and would not be a defense to that cause of action’—the error being that one of the causes of action in the case is a statutory cause of action for violation of section 2132 of the Civil Code of 1902, to which cause of action, under section 2139 of the Civil Code of 1902, gross or willful negligence on the part of the plaintiff’s intestate contributing to the injury would be a defense, even if the failure of the railroad company to give the signal required by section 2132 was reckless, wanton, or willful.”

“(17) Excepts because his honor erred in overruling the first ground of the motion for a new trial, the same being as follows: ‘Because the evidence showed beyond controversy that the crossing at which the accident occurred was hazardous, the view being obstructed up to a point from 12 to 20 feet from the track, that the deceased drove upon it, with his horse in a trot, and, although hard of hearing, failed to stop or look. Under such undisputed evidence plaintiff was not entitled to recover, as a matter of law.’

“(18) Excepts because his honor erred in overruling the fourth ground of the motion for new trial, the same being as follows: ‘Because, under the charge, the jury was permitted to give punitive damages, under section 2139 of Civil Code of 1902, for a neglect to comply with section 2132; whereas, section 2139 does not allow punitive damages.’”

B. L. Abney, and E. M. Thompson, for appellant.
Kirkland & Smith, for respondent.

GARY, A. J. This action was brought to recover damages for the alleged wrongful death of plaintiff’s intestate, Willie E. Osteen, by a passenger train, at a highway crossing near the out-

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skirts of the city of Camden, S. C., on the 14th of December, 1903.

The complaint alleges that the crossing was hazardous in its nature by reason of a close and extensive growth of trees and dense shrubbery, so located with reference to the line of railroad and public highway as to prevent an observation and totally obstruct a view of defendant's track north of said crossing, and a train approaching from a northerly direction, by one approaching the crossing, traveling from the city of Camden; that the vicinity of the crossing was, and for a long time prior to the accident had been, extremely populous; that the crossing was much traveled, and was in almost constant use by pedestrians and vehicles, all of which was in open view of the defendant, that the death of plaintiff's intestate was caused by the careless, negligent, reckless, wanton, and willful acts of the defendant in running its train at a reckless rate of speed, and in failing to give notice, by the statutory signals or otherwise, of the approaching train. The answer admits the collision, and that the plaintiff's intestate died in consequence thereof. It is, in effect, a denial of all the other allegations, except the allegations with reference to the trees and shrubbery, as to which it alleges that it is not the owner, and has no control over the same, but that they belonged to the Upton Court Inn, which has them inclosed by a fence. The defendant also interposed the following defense: "That plaintiff's intestate, the said Willie E. Osteen, at the time and place mentioned in the complaint, in failing to exercise any care or prudence to guard his own safety, and failing to stop, look, and listen before going upon the railroad track as he did, and in not heeding the signals given by bell and whistle by the train referred to, and in undertaking to cross in front of the train at the time and place and under the circumstances he did, was guilty of carelessness and negligence and also gross or willful negligence, which contributed as a proximate cause to his death." The jury rendered a verdict in favor of the plaintiff for \$10,000, and the defendant appeals upon exceptions which will be reported.

1. First, second, third, and seventeenth exceptions: These exceptions will be considered together. In the cases of *Bamberg v. Railroad*, 72 S. C. 389, 392, 51 S. E. 988, the rule is thus stated: "No doubt the failure to look and listen immediately before going on a railroad track, under some circumstances, would be held to admit of no other interference than that the person injured was guilty of contributory negligence, and in such cases the court would grant a nonsuit, on the principle announced in *Jarrell v. Railway Co.*, 58 S. C. 491, 36 S. E. 910. But this support is not to be found in principle or authority for the proposition that it is contributory negligence, under all circumstances, not to look and listen before attempting to cross a railroad track. The view taken in this state is that it is ordinarily for the jury to say whether the attempt, without taking these precautions, was negligence." There was testimony tending to show negli-

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gence both on the part of the plaintiff's intestate and the defendant and the question was properly submitted to the jury.

2. Fourth exception: The complaint is not only for compensatory, but likewise for punitive, damages, and testimony to the effect that the defendant failed to give the signals required by statute was competent, on the ground that it was responsive to the allegations of recklessness. *Mack v. Railroad*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913. The appellant's attorneys were granted permission to review the case of *Mack v. Railroad*, but this court adheres to the rule therein stated.

3. Fifth exception: The defendant also presented the following requests: "A person going upon a railroad track or going to cross a railroad track is rigidly required to do all that care and prudence would dictate to avoid injury, and, the greater the danger, the greater the care that must be used to avoid injury. There is no rule of law which relieves or absolves a person from looking out for the train when he goes upon or to cross the railroad track. He must use ordinary care, and that involves the use of all 'his senses.'" These were changed, and, even, if there was error in refusing to charge the request set out in the exception, such refusal was not prejudicial.

4. Sixth and seventh exception: The appellant's attorneys have not cited any authorities to sustain these exceptions, and we deem it only necessary to state that there may be cases, no doubt, in which the request might properly be changed, when, however, as in this case, there was testimony tending to show negligence on the part of both parties, and there was no doubt as to which was the proximate cause of the injury, the modification of the sixth request was proper, and there was no error in refusing to charge the twelfth request.

5. Eighth exception: The modification of the request simply allowed the jury to say whether the deceased exercised due care in his vigilance, and in this we fail to discover any error.

6. Ninth exception: The question presented by this exception has already been disposed of.

Tenth exception: The case of *Hull, as Administrator, v. S. A. L. Ry.* (S. C.) 57 S. E. 28, in which the opinion has just been filed, is conclusive of this question.

7. Eleventh, twelfth, and thirteenth exceptions: Section 2851 of the Civil Code of 1902, is as follows: "Wherever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony." Section 2852 provides that every such action shall be brought for the benefit of

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the wife, husband, or child, "and in every such action the jury may give such damages, including exemplary damages, where such wrongful act, neglect or default was the result of recklessness, wilfulness or malice, as they may think proportioned to the injury." An action for damages founded upon a wrongful act causing death did not exist at common law, and is wholly dependent upon the statute. The words, "including exemplary damages where such wrongful act, neglect or default was the result of recklessness, wilfulness, or malice," were not originally in the statute, but were inserted as an amendment in 1902. Prior to the amendment it was held that only compensatory damages were recoverable. *Garrick v. Railroad*, 53 S. C. 448, 31 S. E. 334, 69 Am. St. Rep. 874. The action permitted by the statute is not the survival of an action which the deceased had in his lifetime, but is a new cause of action. *In re Estate Mayo*, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660, affirmed in *Morris v. Gas Co.*, 70 S. C. 279, 49 S. E. 854. It was held, being a new action entirely dependent upon the statute, it was necessary for the Legislature to indicate upon what basis the damages should be assessed by the jury. The provision that in every such action the jury was empowered to give damages, including exemplary damages, as they might think proportioned to the injury, was not intended, in any manner, to change the measure of damages existing at the time the statute was enacted, but simply to make plain that the damages were founded upon the injury, and that they should be just and fair. In other words, before the amendment of 1902, the plaintiff was entitled to compensatory damages just as in other cases founded upon injury (*Garrick v. Railroad*, 53 S. C. 448, 31 S. C. 334, 69 Am. St. Rep. 874), and since the said amendment the plaintiff may also recover such punitive damages as the jury in their discretion think are just and fair, in view of all the circumstances attending the particular case (*Brickman v. Railroad*, 74 S. C. 306, 54 S. E. 553).

8. Fourteenth exception: There was testimony tending to prove the facts set out in the complaint, and this question was properly submitted to the jury.

Fifteenth and eighteenth exceptions: The appellant's attorneys in their argument state that, since the appeal was perfected, this court has considered the question raised by these exceptions in the case of *Cole v. Railway*, 75 S. C. 156, 55 S. E. 126, which shows that they cannot be sustained.

9. Sixteenth exception: The presiding judge charged that "gross negligence is equivalent to the absence of slight care. If, therefore, at the time of the collision, the deceased did not exercise slight care to avoid the collision, and such negligence contributed to his injury, the plaintiff cannot recover." He also read to the jury section 2139 of the Civil Code of 1902, which provides that the railroad corporation shall be liable in manner therein provided, "unless it is shown that in addition to a mere want of ordinary care the person injured * * * was at the time of the collision guilty of gross or wilful negligence or was acting in

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violation of law; and that such gross or wilful negligence or wilful act contributed to the injury." It will be seen that the presiding judge, in effect, charged the proposition for which the appellant contends.

It is the judgment of this court that the judgment of the circuit court be affirmed.

BOWLES v. CHESAPEAKE & O. R. Co.

(Supreme Court of Appeals of West Virginia, Feb. 5, 1907. On Rehearing, May 8, 1907.)

[57 S. E. Rep. 131.]

Railroads—Accident at Crossing—Negligence Per Se.*—It is negligence per se to back a train, on a dark night, over a public railroad crossing without warning, by blowing a whistle or ringing a bell, or guard or light on the advancing reversed car. The company must adopt some means to warn travelers of danger, such means as will be equally efficient as the bell or whistle warning in the case of an advancing unreversed train. The precaution must suit the circumstances and be adequate under the circumstances.

On Rehearing.

Same—Railroad Crossing—Reaching by Walking on Track.—Though one reach a public crossing over a railroad by walking on the right of way between tracks, though not between the rails, this does not deprive him of the benefit of the safeguards demanded of the company for a person while crossing the railroad on such public crossing. When on the crossing he is entitled to such safeguards, no matter whence he came, or how he reached the crossing.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by Rushia A. Bowles, administratrix, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Simms, Enslow & Alderson and *R. M. Baker*, for plaintiff in error.

S. D. Littlepage, and *Payne & Payne*, for defendant in error.

BRANNON, J. John H. Bowles was killed by a train of the Chesapeake & Ohio Railway Company, and his widow and administratrix, Rushia A. Bowles, having recovered a judgment against the company for \$6,500 damages, the company appeals.

Bowles and wife, on a dark night, January 19, 1904, were walking on the railroad right of way going to a restaurant at

*For the authorities in this series on the subject of the precautions to be observed when kicking, backing or switching cars at crossings, see foot-notes appended to *Reid v. Atlanta & C. Air Line Ry. Co.* (N. Car.), 22 R. R. R. 670, 45 Am. & Eng. R. Cas., N. S., 670.

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Lewis Crossing which was a crossing of a public road over the railroad; Bowles walking, not on the track, but in a space of 12 feet between two tracks. Bowles thus walked a quarter of a mile. The restaurant was on the public highway some 50 feet from the railroad track. The highway crossing was 30 feet wide. When Bowles got to the crossing, he attempted to cross the railroad track, when he was struck by a train composed of a locomotive and caboose, which was backing across the highway. A vital question in the case is whether Bowles, when struck, was within the limits of the public road crossing, for, if he was not, he had no right to be there, and the railroad company was not bound to resort to care and signals to warn Bowles of danger, as he was a trespasser, not entitled to such warnings, and could recover only for gross negligence. *Huff v. C. & O. Ry. Co.*, 48 W. Va. 45, 35 S. E. 866. But if he had reached the crossing, and was within its limits, a vastly different rule applies, as Bowles would then be lawfully on the track in effort to cross. At crossings, surely, neglect of the company to adopt reasonable means to avoid injury to travelers is actionable negligence. One who is, himself without fault, injured at a crossing, and whose injury may be fairly charged to the negligence of the company, has right to recovery. *Ray v. Railway*, 57 W. Va. 333, 50 S. E. 413. Was Bowles, when struck, within the limit of the crossing? Here the evidence is squarely conflicting. Several witnesses swear that he was struck within the road limit, and dragged on the ground some distance, while the conductor and brakeman say he was struck outside the road limit. The fact that he was struck inside the crossing seems confirmed by the fact that the ground seemed swept as if by the body being dragged. Another decisive fact is that the blood and hair of Bowles were on the rail of the track inside the crossing. A vital question of fact before the jury was whether Bowles was struck inside the limit of the crossing. It was a question of fact, and depended on weight of evidence and conflicting evidence. It is hardly necessary to say that a jury is the judge here. We are bound to take the truth to be that Bowles was killed on the highway crossing, under the verdict; otherwise, we would be acting the jury. Finding that Bowles had reached the crossing, we must inquire whether the company did those things required of it by law. If it did not, it is chargeable with neglect.

The Code demands that the whistle be blown or the bell on the locomotive sounded at least 60 rods from a road crossing. Its omission is negligence. *Beyel v. Railway*, 34 W. Va. 538, 12 S. E. 532. This engine and caboose were standing 280 feet from the crossing. Evidence for the defense says that, when starting to back over the crossing, three sharp whistles were blown. It is not claimed that any more sounds were made. When they were sounded, another large train was passing, likely drowning the three whistle sounds. The statute does not say that the sound shall be kept up the whole 60 rods; but it does negative the idea that three short blasts will answer, as it says, "and be kept ringing

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or whistling for a time sufficient to give due notice of the approach of such train before a street or highway is reached." The very fact that the distance was so much less than 60 rods would seem all the more to require the warning kept up till the crossing was reached. Can it be said that the company was released from continuing the warning over the whole 280 feet, by the fact that the blasts were sounded? It cannot be said that, as the train was not distant 60 rods, the statute does not apply to the case. The statute demands this warning before crossing. The mere fact that the train has not that distance to go before reaching the crossing does not absolve it from adopting the warning for such part of that distance as is to be passed over. The train need not go back 60 rods to blow, but it must give the traveler the benefit of the safety warning for such distance as is available. So, taking the defense's evidence, I do not think it fairly complies with the demand of the law. The short blasts, and no further sound, were not a compliance with the plain meaning of the statute, did not furnish a warning reasonable under the circumstances, a train backing a very dark winter night. But here we meet conflict of evidence again, as several witnesses say that no whistle was blown nor bell sounded. This, again, a jury question. Furthermore, here were an engine and caboose backing in deep darkness over a crossing. Was not great care required of the trainmen? The conductor says that he and the brakeman were on the rear platform of the caboose, with lanterns. The brakeman does not confirm this: He says he was on the end of the caboose next to the engine. Here is conflict. But several witnesses swear that both men were on the caboose platform next the engine, not at all on the end which struck Bowles. These witnesses say there was no one on this end of the caboose, and no light on it. There is evidence tending to show that lights called "markers," used to show that the train is the last, which would be on the end of the caboose, had been removed. The brakeman was heard to say so. When a train is backing cars over a street or road in the night, is not diligence demanded? It is much more dangerous than when the engine is ahead. We would be unwilling to say that the statutory warning by bell or whistle would be adequate in the case of a train reversed and backing over a crossing. That is designed for a train having a locomotive in advance. The warning is then on the first car approaching; whereas, when the train is reversed, it is quite different. The distant bell or whistle would then furnish little safety. Wood on Railroads, § 1517, says: "It is not necessarily negligence on the part of a railroad company to back and switch cars over a highway crossing, nor to make 'flying switches' there. It has a perfect right to make such a use of that part of the track, provided proper precautions are taken for the safety of travelers using the crossing. But as a matter of common knowledge such a practice is peculiarly dangerous, and therefore creates a duty of unusual care on the part of the company. There should be abundant warning, not only by the usual signals of bell and whistle, but there should be

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a flagman near the track, or a watchman on the nearest approaching car to warn travelers who are near. In this, as in other cases, the exact measure of the company's duty, and the question as to whether it has been discharged, is for the jury, though where a 'flying switch' is made over a crossing without any notice being given, and no watchman or flagman posted to give warning, it may be held as a matter of law that the company was negligent." Elliott on Railroads, § 1162, says that it has often been held that kicking or backing a car over a crossing without warning, and in the absence of a lookout, is negligence per se; that it is a true proposition in many cases, but not always. Yet he grants that, unless proper precautions are taken, it is negligence, and whether they have been taken is a jury question. This is an important matter for the safety of the public, for the preservation of human life, with which increased care or cost to a railroad company is not to be compared. The precaution must be fair and adequate in the particular case. The case of *Vance v. Railway*, 53 W. Va., 338, 44 S. E. 461, sustains this position.

Under the verdict of conflicting evidence, we are compelled to find that these cars in darkness were backed over the crossing, without any lights, and without any one to protect crossers. The conductor says he halloosed at Bowles from the platform, but Bowles made no effort to save himself. The conductor says he saw him 30 feet away. He says the train was going six or eight miles an hour. He says the train could have been stopped in 30 or 35 feet, yet, when asked why he did not stop it answered, "It was done that quick," snapping his fingers. This shows the train was going fast, and evidence for the plaintiff so states; and that without any precautions. Our case of *Nuzum v. Railway Co.*, 30 W. Va. 228, 4 S. E. 242, certainly requires means of warning passers in public places: "To excuse a railroad company from suddenly and without warning backing a freight train against a person lawfully using a crossing, it must be shown that the person was guilty of some act of legal negligence, such as a person of ordinary prudence would not be guilty of under the circumstances." "A person using a public crossing over a railroad is not bound to assume that the company will negligently, without warning, back a motionless train against her." *Meeks v. Railroad*, 52 W. Va. 99, 43 S. E. 118, Syl., points 1, 2. Has he not, on the contrary, right to assume that care will be used? The very fact that a sane, sober man, in the dark of night, does walk into the jaws of death under such circumstances as in this case, tells us that no lights, no alarm, were used. Would the disaster have happened if there had been signal lights, or alarm bell, or whistle? Under the rule above put, how can we find Bowles guilty of negligence? He attempted to cross. Without bell, whistle, light, or warning, the cars backed rapidly over the crossing. Bowles did not see the train down the track in the dark. He could not hear, as one of the trainmen said it made but little noise. And another long train had just passed on another track, and likely its noise was yet in Bowles' ears. If he heard train

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noise, he would perhaps attribute it to that. No negligence is imputable to Bowles. The vital questions in this case are questions of fact to be determined on oral evidence, and that conflicting, and dependent on credibility of witnesses. "The jury is the sole judge of the credibility of contradicting witnesses, and of the weight to be given to their testimony." *Young v. Railroad*, 44 W. Va. 218, 28 S. E. 932. If the plaintiff's evidence is credible, we do not see how the verdict could have been different.

The defense was refused the following instruction: "The court instructs the jury that the undisputed facts in this case show that Jno. H. Bowles was unlawfully walking on defendant's track for his own convenience in going to Wood's restaurant, and, although he may have been struck on or near the crossing, yet his administratrix cannot recover damages for his death, even if legal signals were not given nor lights displayed, unless you find from the evidence that, after he was discovered on the track, the defendant's employees by the exercise of reasonable care could have avoided striking him." This assumes that the "undisputed facts" proved that Bowles was unlawfully walking on the track, when in fact he was not in the sense of one walking on the track over which cars run, but was walking on a space 12 feet wide between tracks over which trains moved. The instruction would make Bowles for that reason, a trespasser, to whom the railroad owed no duty on the crossing, under principles stated in *Huff v. C. & O. Co.*, 48 W. Va. 45, 35 S. E. 866. That rule does not apply to this case, as Bowles was killed on the crossing. He was not using the track as a footway, as in the *Huff* case. On that space Bowles was not a trespasser in that sense. He neither obstructed trains, nor was he in imminent danger like a walker on the track. He was a trespasser only in the sense of civil law making any one a trespasser who enters another's close. The instruction is very misleading, as it would require the jury to place Bowles in just the same place, and guilty of the same culpable, gross negligence chargeable to one walking between rails, where the railroad would not be liable at all, unless the trainmen saw him and could be charged with gross negligence in failing to save him; and, further, it tells the jury that, though Bowles may have been struck on the crossing, the fact that he had so walked on the track would exonerate the company from liability, even though no signals were given or lights displayed, unless, after discovery of Bowles, the employees, by care, could have avoided striking him. This would say that for his past wrong in walking the track Bowles forfeited right to warning, even though he had reached "the city of Refuge," where the law would spread over others the ægis of protection by demanding certain warnings at crossings. I would hold that, even if Bowles had been walking on the track, when he reached the crossing he ceased to be a trespasser. When he set foot in the crossing, it became immaterial how he reached it, whether by coming off the track or from the county highway, because over the ground covered by the crossing the company was bound to furnish protection and safety, for all persons on it. No-

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body claims that Bowles intended using the track beyond the crossing. Nobody says that he did not intend, if in the crossing, to use it to cross the track, as he would have had right to do, if he had reached the track by means of the highway. This instruction withdrew from Bowles, though on the crossing, and intending to use the track no further, all safeguards given by law to those using crossings.

For these reasons, we must affirm the judgment.

On Rehearing.

Upon a petition for rehearing, it is proper to say that the above opinion does not mean that one walking on the railroad's right of way, though not between the rails, is not a trespasser. The opinion says he is a trespasser, but it does not pretend to treat of injury received by one so walking, while there walking. We do not say what is the duty of the company, or what its liability under that state of facts. The opinion rests on the basis that Bowles, though he had been walking on the right of way, in the space between the tracks, had reached the crossing. The instruction would say that so walking made Bowles a trespasser so far that, even if he had reached the crossing, he was not entitled to the safeguards and warnings given by law to those using a crossing. It would impose this penalty, the loss of such safeguards and warnings, for the past wrong of Bowles in reaching the crossing by walking on the right of way. The above opinion was intended to show that his so reaching the crossing could not deprive him of the safeguards given by law to one on a public crossing. I repeat that it does not touch the question of liability for an injury received by one walking on the ground of the company, though not on the track itself, as Bowles was not run over while walking in the space between the tracks, and the question of liability in such case is not involved. If any difference as to duty of the company to one not on the track, but on the right of way, as there likely is, it is in favor of the company. As to the claim that Bowles is not shown to have looked and listened, there is no evidence that he did not, or whether he did or not. The night was dark, and another train passing. "A railway company, backing a train across a public street or highway in the dark, is bound to give warning of its approach, especially where another train is passing over the same crossing on another track at the same time and in another direction." 2 Thomp. on Negligence, § 1571. It not appearing from the plaintiff's case that Bowles was guilty of contributory negligence in this respect, the burden of proof to show it rested on the defendant. *Sheff v. City*, 16 W. Va. 307; *Gerity's Adm'x v. Haley*, 29 W. Va. 98, 104, 11 S. E. 901. If it could be fairly found from the plaintiff's evidence that Bowles was thus negligent, there could be likely no recovery; but surely the jury could from the facts find that it did not so appear. Discarding the wife's evidence that he was looking in the direction of the train, we know he was walking in sober condition with eyes open in that direction, and we may fairly infer that he was looking, but for want of signal lights on the dark caboose could not see the

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train, and that for want of bell sound, and because of the noise of the great freight train on an adjoining track, he did not hear the backing train, as its noise was not heavy. The very negligence of the trainmen caused him to fail to see or hear it. Was not the jury justified in saying they could not fairly find negligence in Bowles in failing to look and listen. To justify such finding of negligence the case must be clear. In fair probability, if the company had used ordinary care, that care required by law, the calamity to Bowles would not have happened. If there had been a man on the caboose to warn him, if even there had been only lights on it, it is highly probable that it would not have occurred. So that I may cite, without strain, *Dewney v. R. Co.*, 28 W. Va. 732, and *Richmond, etc., v. Anderson's Adm'r*, 31 Grat. 812, 31 Am. Rep. 750, holding, that, even where the plaintiff is chargeable with negligence contributing to the injury, yet, if it could have been avoided by ordinary care on the part of the defendant, such negligence will not defeat recovery. I suppose this rule is only to be applied where care would have avoided the accident, but may we not say so in this case? In the first opinion I did not discuss this matter, because it did not occur to me as important in the case, and does not now.

If we suggest that by being on the right of way, and thus close to the noise of the passing freight train, he disabled himself from hearing the other train, still he was entitled to lights on the backing train, so that he could save himself by discovering it by sight. He had right to the help of both hearing and sight. He was also entitled to a bell sound on the backing train, as we do not know whether the freight was just there; indeed, as the evidence is that it just passed, we may say that a bell sound on the backing train would have warned him.

HUTSON et al. v. SOUTHERN CALIFORNIA RY. CO.

(Supreme Court of California, March 25, 1907. Rehearing Denied April 23, 1907.)

[89 Pac. Rep. 1093.]

Railroads—Negligence—Crossing Accidents—Contributory Negligence—Submission to Jury.—In an action against a railroad for injuries received in a collision at a crossing between the wagon wherein plaintiff's were riding and defendant's train, evidence held to justify the submission to the jury of the question of plaintiffs' contributory negligence.

Same—Care Required of Person Crossing Track.*—One approaching a railroad crossing is not authorized to assume that the

*For the authorities in this series on the subject of the right of persons about to cross railroad tracks to assume that those in charge of trains or cars will perform their duties, see foot-notes appended to *Elgin, etc., Ry. Co. v. Hoadley* (Ill.), 22 R. R. R. 663, 45 Am. & Eng. R. Cas., N. S., 663.

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persons operating a train will not in any way be negligent in its operation.

Negligence—Instructions—Burden of Proof.—In an action for injuries through negligence, an instruction that the burden of proving contributory negligence to the jury's satisfaction by a preponderance of the evidence, etc., rested on defendant, was subject to criticism as tending to make the jury believe that something more than the weight of the evidence or preponderance of probability was required.

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Lucian Shaw, Judge.

Action by Albert Hutson and another against the Southern California Railway Company. Judgment for plaintiffs and defendant appeals. Reversed.

Rehearing denied; Beatty, C. J., and Shaw, J., dissenting.

J. N. Norton, E. W. Camp, Paul Burks, and E. E. Millikin, for appellant.

J. H. Merriam and Hunsaker & Britt, for respondents.

PER CURIAM. When this case was in department, in the opinion there rendered it was said:

"This is an action for damages, wherein plaintiffs charge that, by the negligent operation of defendant's train, they were struck by it while crossing the track of defendant, and sustained the injuries for which the damages were sought. Plaintiffs were riding in a heavy wood wagon drawn by two horses, and were approaching the crossing at which there were two tracks, the tracks of the Terminal Railway and the tracks of the defendant's railway. They had passed over the track of the Terminal Road, and their horses were about to step onto defendant's track, when they discovered that the locomotive of a south-bound freight train on defendant's track was approaching within 150 feet of the crossing. Plaintiff, Albert Hutson, who was driving, then made an effort to stop his horses, but did not apply the brake, and immediately thereafter urged his horses forward and across the track. The older boy of the two children who were in the wagon with him ran to the rear end of the vehicle and jumped out, and the father tossed the other boy to the ground. The engine collided with the rear half of the wagon, and both the plaintiffs were thrown to the ground and injured. The negligence of the defendant, as alleged, consisted in its failure to give any warning of the approach of the train by blowing the whistle or ringing the bell, and it was further charged that the train approached the crossing at a negligently high rate or speed. This speed was estimated by the various witnesses at from 16 to 20 miles an hour. The view of plaintiffs approaching the crossing was obstructed, though there was a place of safety near the track where plaintiffs could have stopped the team and had a clear view. It was first urged by appellant that, as matter of law, plaintiffs were guilty of such contributory negligence as to preclude recovery; but upon a review

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of the whole evidence we think that this question was fairly submissible to the jury.

"The court, however, erred in certain instructions given to the jury, and these errors demand a new trial of the case. The court instructed the jury as follows: '(6) You are instructed that the plaintiffs had a right to drive in the road or street where they were and to cross the defendant's track, and they are not chargeable with contributory negligence in endeavoring to cross the track, provided they adopted all reasonable precautions against injury from moving trains, and they are not chargeable with contributory negligence, unless they failed to take such precautions. In determining whether the plaintiffs took all reasonable precautions, the jury should consider the situation of the crossing and the circumstances attending the accident, bearing in mind that the plaintiffs had a right to rely on the performance by the defendant's employees of every act imposed by law upon them when approaching a crossing with their train. The plaintiffs, and each of them, were authorized to assume that the men in charge of the train would approach the crossing with due care, without running at an excessive or unreasonable rate of speed, and would cause the bell on the engine to be rung and kept ringing for the distance of 80 rods before reaching the crossing. The acts and conduct of the plaintiffs, and each of them, in looking out and listening for the approach of the train are therefore to be considered in connection with the assumption, which they had the right to make, that care in the management of the train would be exercised in the manner just indicated.'

"It is not the law of the state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but it is opposed to the law as laid down in the decision of this state and the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases, and in the early case of *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 604, this court said: 'The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation when a bell is not sounded or a whistle blown as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff * * * materially and proximately contributed to the injury.' In *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, this precise question was involved; this court saying: 'The only answer to this is that defendants' employees did not ring the bell or sound the whistle, and that the fireman was not at his place on the left side of the engine. The argument, of course, is that if the signals had been given plaintiff might have heard, and, not hearing them, he had the right to assume when he was about to make the crossing that the train had not then reached the whistling post, 1,325 feet

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above, and that the fireman might have seen him in time to have prevented the accident had he been on the lookout. It may be admitted that all this was culpable negligence on the part of defendants' employees. The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery for the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant.' In *Green v. Southern California Ry. Co.*, 138 Cal. 1, 70 Pac. 926, the rule of law laid down in *Herbert v. Southern Pacific Co.* is reaffirmed; the chief justice placing his concurring opinion upon this precise ground. The same doctrine is also announced in *Pepper v. Southern Pac. Co.*, 105 Cal. 398, 38 Pac. 974, and in *Bilton v. S. P. Co.*, 83 Pac. 440, 148 Cal. 443. The rule is simply this: That a railroad crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train. Says the Circuit Court of Appeals, in *Erie Railway Co. v. Kane*, 118 Fed. 234, 55 C. C. A. 129: 'Again, counsel for defendant in error urges that it was not negligence for decedent to be there, because he was not bound to anticipate Bowker's negligence through which the collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where as a matter of law it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the federal courts that it is negligence for a highway traveler not to anticipate failure on the part of the engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals.' This is in accord with the doctrine of the Supreme Court of the United States, as laid down in *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, where it is said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track in order to avoid an approaching train and, not to walk carelessly into a place of danger.' "

The foregoing language is adopted and adhered to. In contemplation of the new trial which must be ordered, it should be said that instruction 7, as given by the court, contains the same error of law as that in the instruction just discussed. Additionally, it dangerously approaches the forbidden territory of instructions upon the facts. The court also instructed the jury that: "As said above, the burden of proof of such contributory negligence rests upon the defendant, unless it proves the same to *your satisfaction* by a preponderance of the evidence," etc. It would be better to omit the words here italicized. In a civil

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case it is the weight of evidence or preponderance of probability which is sufficient to establish a fact. *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365. As given, the instruction might tend to confuse a jury into believing that something more than this was required.

For the foregoing reasons, the judgment and order appealed from are reversed.

ST. LOUIS & S. F. R. CO. v. BEETS.

(Supreme Court of Kansas, March 9, 1907.)

[89 Pac. Rep. 683.]

Carriers—Stock Yards—Negligence.*—Where a common carrier of live stock provides stock yards at its stations for the purpose of receiving stock for shipment, it is the duty of such carrier to keep its yards in a reasonably safe condition and a failure to do so is negligence.

Same—Escape of Cattle—Damages.—When a shipper of live stock arranges with the station agent of a railroad company to ship two car loads of cattle, and afterwards, in pursuance of such arrangement, places the cattle in the company's stock yards at such station for shipment, and without fault on his part one entire side of the pen containing his cattle falls down, because the posts are rotted off, and the cattle escape and are injured, the company is liable for any damages sustained thereby.

Appeal—Objections Not Raised below.—The court will decline to consider a question presented in a brief, if it appears from the record that such question was not presented to the district court.

Same—Harmless Error—Misleading Instructions.—Where an instruction is given which tended to mislead the jury, the error, if any, will be cured by a special finding which clearly shows that the instruction was properly understood.

Carriers—Injury to Live Stock Shipment.—The live stock shipping contract attached to defendant's answer examined, and the provisions thereof relied upon by defendant held to be immaterial, because relating to damages received during transportation only.

(Syllabus by the Court.)

Error from District Court, Miami County; W. H. Sheldon, Judge.

Action by H. P. Beets against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

L. H. Parker, and *Pratt, Dana & Black*, for plaintiff in error.
F. M. Sheridan, for defendant in error.

GRAVES, J. This action was commenced in the district court of Miami county to recover damages sustained by cattle escap-

*See note at end of case.

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ing from the stock pens of the plaintiff in error at the station of Hillsdale. The plaintiff recovered the sum of \$214.24, and the defendant, as plaintiff in error, brings the case here for review.

The defendant in error resides about 2 1-2 miles from Hillsdale, and has been engaged for several years in the business of buying and snipping cattle to Kansas City. On June 7, 1904, having 46 fat cattle ready to ship, he requested the agent at that station to furnish cars for such shipment, and upon the promise that they would be supplied proceeded with arrangements to load the cattle. The railroad company had stock pens and the usual arrangements for loading stock at that station. Beets placed his cattle in the stock pens, and, while away with his team after hay to be placed in the cars, and the fence on one side of the stock pen fell down, and the cattle escaped. They were very fat, and had been kept in dry lots on dry feed. They were out several hours, and had access to green feed. This gave them the scours, causing a shrinkage in weight of about 40 pounds per head, and otherwise depreciated their value. The stock pens had been standing several years, and the posts were rotted off at the ground which weakened the fence so that it was easily pushed over. Beets gathered up the cattle and loaded them, after which, and before the train left the station, live stock shipping contracts were signed, containing the usual limitations in favor of the carrier, and the customary free transportation to the shipper. It is claimed that the provisions of the contract relieve the railroad company from liability. The parts relied upon read:

"That as a condition precedent to a recovery for any damages or delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

"That no suit or action against the party of the first part for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall accrue, and should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

These provisions relate to and cover only such injuries as occur while the stock is in transit, and do not apply to damages sustained either before transportation begins or after it has ended. *Railway Co. v. Poole* (Kan.) 87 Pac. 465; *Cornelius v.*

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Railway Co. (Kan.) 87 Pac. 751. The damages in controversy were sustained on account of deficient stock pens, and are wholly disconnected from the transportation of the stock in the defendant's cars or over its railroad. The answer of the railway company, so far as it relates to this live stock shipping contract, may therefore be regarded as immaterial. The remainder of the defendant's answer consists of a general denial and an allegation of contributory negligence. The issues made by these defenses were fully presented to and determined by the jury, and the verdict cannot be disturbed, unless material error occurred during the trial.

Complaint is made that the court erred in its instructions. Most of them, however, relate to the shipping contracts, and the questions raised on account thereof, in the view we have taken therefore, need not be considered. Complaint is made of one instruction which reads: "Where a railroad company provides stock yards for the purpose of receiving stock to be shipped over its line, it is the duty of such company to see that said yards are kept and maintained in a reasonably safe condition, so that the same will retain and hold ordinary cattle under ordinary circumstances; and if the company provides such yards for a shipper of cattle desiring to ship over its line, and permits him to place his cattle in such yards or corral for the purpose of shipping with the consent of the company, then, if said corral or stock yards is so defective as not to be reasonably safe under ordinary circumstances, such company would be liable to such shipper or stock owner for whatever damages, if any, he sustained or was occasioned to said cattle by reason of the negligence of the defendant company, if any, in allowing said stock yards to be in a defective condition, such as not to be reasonably suitable and reasonably safe for the purpose of receiving and retaining such cattle." This, we think, fairly states the law applicable to the case. In the case of *Cooke v. K. C., Ft. S. & M. R. Ry. Co.*, 57 Mo. App. 471, where the facts and legal questions involved were substantially the same as here, an instruction practically the same as the above was approved, and the cases of *Mason v. Railroad*, 25 Mo. App. 473, and *McCullough v. Railroad*, 34 Mo. App. 23, hold practically the same way. The specific objection here made to this instruction is that no evidence of negligence was produced. We think there is ample evidence of negligence to sustain the verdict. The stock yards had been in use many years. The posts were rotted off at and near the ground—not a single post only, but one entire side of the yard. This place was kept as a receiving pen for shippers of all kinds of live stock, during all the years since it was built. These facts, unexplained, justify the inference of negligence. When common carriers of live stock provide pens, chutes, and other appliances for loading and unloading stock at their shipping stations, and invite and require shippers to use them, it is the duty of such carrier to keep such pens and loading appliances in a reasonably safe condition. It is not the duty of

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shippers to discover defects therein and notify the carrier thereof. On the contrary, a shipper has a right to act upon the assumption that his stock will be safe therein. *Potts v. Railroad*, 17 Mo. App. 394; *Railway Co. v. Hedger*, 13 Am. Law Reg. N. S. (Ky.) 145.

Much of the argument for the plaintiff in error of this court is devoted to a clause in the shipping contract attached to its answer, which reads: "And the shipper hereby releases and does waive and bar any and all causes of action for any damages whatsoever which have accrued to the shipper by any written or verbal contract prior to the execution hereof concerning said stock or any of them." This cause and argument we decline to consider, for the reason that the question was not presented to the district court. This contract contains more than 20 conditions and clauses in fine print, difficult to read. A copy is attached to the answer as an exhibit, and possibly under our code of pleading this alone would be sufficient to require court and counsel to take notice of its entire contents; but the pleader went further. He undertook to state specifically wherein the plaintiff had failed to comply with the contract, and thereby forfeited his right to recover. This would naturally lead the court to assume that these specific averments constituted all that was relied upon. The defendant requested the court to give several special instructions, but none of them referred in any way to this clause. The court gave lengthy instructions evidently intending to cover every question presented, but this matter was entirely overlooked. It seems quite clear from the record that this matter was not presented to the district court. It is not the province or purpose of this court to review questions not decided by the trial court.

Another instruction given by the court is challenged by plaintiff in error. It reads: "If you find for the plaintiff, and that he is entitled to recover in this action, the measure of his damages should be the actual loss occasioned by the injury to the cattle as shown by the evidence in the case, together with any expense and outlay, if any is shown, that plaintiff suffered by reason of having to get said cattle back to the stock yards for shipment; and, in estimating the loss and damages, so far as the stock is concerned, you may take into consideration the value of the cattle before escaping from the stock yards and their lessened value, if any, shown by the evidence, after escaping from the stock yards." It is contended that this instruction directs the jury to consider the value of the cattle at Hillsdale in estimating the damages sustained, instead of a Kansas City. We do not think the instruction open to this construction. All the evidence as to values was confined to the market value at Kansas City. There was nothing in the case to cause the jury to think of value at any other point. All question, however, as to the jury being misled, is set at rest by its special finding, which expressly states the value as "one the market at Kansas City."

It is further urged that as the jury found the damage to the cattle on the Kansas City market to be \$101.20, and the general

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verdict was \$214.24, it must have been misled by this instruction. But there were two elements of damages presented: First, shrinkage in weight; second, depreciation in value because buyers would think, from appearances, that the cattle had not been fattened on dry feed exclusively. The jury gave the shrinkage in pounds, and the general depreciation as above stated. These two amounts aggregate the sum stated in the general verdict.

This disposes of all the questions presented. We are unable to find any material error, and the judgment of the district court is affirmed. All the Justices concurring.

NOTE.

STOCK-YARDS—DUTIES AND LIABILITIES OF CARRIERS.

1. Duty to Furnish Stock-Yards, 323.
 - a. In General, 323.
 - b. Other Statements and Illustrations in Regard to Carrier's Duties and Liabilities, 324.
 - c. Extra Charge, 326.
 - d. Discrimination, 326.
2. Degree of Care Required of Carrier, 327.
 - a. Carrier as an Insurer, 327.
 - b. When Carrier Not an Insurer, 331.
3. Proximate Cause, 332.
4. Contributory Negligence, 333.
5. Miscellaneous, 335.

Paucity of Adjudications.

There are so few adjudications on this subject to be found in the digests that it seems impossible to write a complete case supported monograph on this branch of carrier law. However, the few cases we have been able to collect may prove of some value.

1. DUTY TO FURNISH STOCK-YARDS.**a. In General.**

A railroad company, holding itself out as a carrier of live stock, is under a legal obligation to provide suitable stock-yards for receiving such live stock as may be offered for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned, if the nature of the locality and its surroundings entitle shippers or consignees to the use of stock-yards, as reasonably necessary facilities. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 49 Am. & Eng. R. Cas. 149; *Myrick v. Michigan Cent. R. Co.*, 9 Biss. (U. S. Cir. Ct.) 44; *Lackland v. Chicago & A. R. Co.* (Mo. App.), 74 S. W. 505, 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414; *Houston & T. C. Ry. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, 3 R. R. R. 685, 26 Am. & Eng. R. Cas., N. S., 685; *Missouri, K. & T. R. Co. v. Woods* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 519, 31 S. W. 237; *Reynolds v. Great Northern*

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Ry. Co. (Wash.), 82 Pac. 161, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

b. Other Statements and Illustrations in Regard to Carrier's Duties and Liabilities.

Duty Measured by Necessities of Respective Localities.—A railroad, as a carrier of live stock, must be at all times in proper condition with respect to stock-yards and other facilities, both to receive stock from the shipper and to deliver stock to the consignee, according to the necessities of the respective localities in which it is received and delivered. So held in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 49 Am. & Eng. R. Cas. 149.

Reasonably Sufficient for Business of Locality.—In *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 49 Am. & Eng. R. Cas. 149, it is held that in respect to the mere loading and unloading of live stock at a particular city, a railroad, as a carrier of live stock, is required by the nature of its employment to furnish such suitable and convenient stock-yards and other appliances as are reasonably sufficient for the business at that place.

Ordinary Shipments.—It is duty of a railroad, as a common carrier of live stock, to furnish pens sufficient to accommodate ordinary shipments. So held in *Texas & P. Ry. Co. v. Fambrough* (Tex. Civ. App.), 55 S. W. 188.

Sufficiency of Pens for Delivering Cattle—Business of Other Carriers.—But in *Casey v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 83 S. W. 20, it is held that a railroad company, as a common carrier of live stock, in providing pens for delivering cattle at a certain point, is only required to have such a number of pens as, according to the business of the carrier at that point, is sufficient for the ordinary and usual volume of business, and the business of other carriers there is immaterial in this connection.

Custom to Deliver at Pens of Stock-Yards Company—Duty of Carrier to Have Pens at Its Own Station.—And in *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. Rep. 755, it is held that a railroad company accustomed to deliver cars of cattle at stock-yards off its line, by transporting them over a line belonging to the stock-yards company, for which it pays a fixed sum per car, is under no obligation to consignees whose business is located at the stock yards to supply unloading facilities at its own station in a different part of the city.

Failure to Furnish Pens—Breach of Contract—Liability.—Where stock pens are applied for and are not furnished according to a contract for the shipment of live stock, and it is not shown that any other shipper had the same or a better right to the use of the pens as the applicant, the company is liable to the latter for loss occasioned by the failure to furnish the pens. So held in *Missouri, K. & T. R. Co. v. Woods* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 519, 31 S. W. 237.

Effect of Duty of Shipper to Load and Unload and Feed and Water.—Although, under the contract of shipment, the shipper is required to load, feed, water, and unload his stock at his own risk and ex-

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pense, yet it is the duty of the carrier to furnish suitable and safe stock-pens and other facilities for loading and unloading the stock while being carried over its line, and a failure to provide such facilities is negligence, for the consequences of which the carrier is liable, and against which it cannot contract. So held in *Chesapeake & Ohio Ry. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935.

Possession of Stock-Yards Company as That of Initial Carrier—Escape—Liability.—In *Gulf, etc., Ry. Co. v. Eddins*, 7 Tex. Civ. App. Rep. 116, 26 S. W. 161, it appeared that a railroad, obliged to deliver stock to a connecting railroad, did deliver the car containing the stock to a stock-yards company, at the city of the transfer. It was held that the possession of the stock-yards company was that of the first carrier; and that the latter could not relieve itself from liability by showing that the stock escaped from the pens of the stock-yards company before delivery to the connecting railroad.

Duty under New Hampshire Statute.—Under N. H. Pub. St. 1901, c. 160, § 1, requiring railroads to furnish all persons reasonable facilities for the transportation of freight over their roads, and for the use of depots, buildings, and grounds in connection with such transportation, it is the duty of a railroad company to furnish cattle yards to restrain cattle offered for transportation prior to their being loaded. So held in *Flint v. Boston & M. R. R. (N. H.)*, 59 Atl. 938.

Insecurity of Pens at Shipping Point.—A railroad company, as a common carrier, with stock-pens at its stations invites shippers to use them preparatory for loading, and are responsible for damages resulting from their insecurity. So held in *Tracy v. Chicago & A. R. Co.*, 80 Mo. App. 389.

Unloading.—It is the duty of a railroad company receiving live stock for transportation to have proper appliances, stock-pens and other facilities for unloading them, whenever, in the course of the transit, it may become necessary to unload them for the purpose of feeding. So held in *Dunn v. Hannibal & St. Jo. R. Co.*, 68 Mo. 268.

Duty to Deliver to Consignee in Yards.—It is the duty of a carrier of live stock to deliver the same to the consignee in inclosed yards, convenient to the place of unloading. So held in *Reynolds v. Great Northern Ry. Co. (Wash.)*, 82 Pac. 161, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

Unsuitable Pens Seen by Shipper.—A railroad company, as a common carrier, cannot exonerate itself from resulting damages from breach of its implied duty to furnish suitable stock pens. And this rule is applicable even though the pens are seen by the shipper, who also attends his stock. So held in *Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473.

Failure to Keep Pens in Repair—Defects Discoverable by Shipper—Liability.—In *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948, it is held that even if a railroad's stock-pen is unsafe and the owner of cattle placed therein can discover its condition, and loss is caused by its defects, the railroad is responsible for such loss, as the carrier cannot absolve itself from liability by permitting its stock-pens to become so dilapidated as to be recognized as unsafe by the shipper.

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Shipper's Agreement to Unload at Own Risk—Absence of Yards.—Where a shipper of live stock did not know there were no yards at the place of destination for unloading, the provision in the contract of shipment that he should load at his own risk must be construed as made with reference to unloading where there are proper facilities. So held in *Reynolds v. Great Northern Ry. Co.* (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70, 82 Pac. 161.

Cattle Suffering in Transit—Excuse for Refusal to Unload—Pen Unsafe for Hogs.—In *Johnson v. Alabama & Vicksburg Ry. Co.*, 69 Miss. 191, 11 So. 104, it is held that where cattle transported in a car with hogs are found to be suffering, the conductor cannot refuse the shipper's request to lay out the car at a station, merely upon the ground that the stock-pen there is unsafe for hogs; it not appearing that the cattle could not be separately unloaded, or that the company was under no duty to make the stock-pen secure.

Stock-Yards on Fire—Excuse for Non-Compliance with Federal Statute.—That the carrier's stock-yards at its feeding station were on fire when the train arrived there was not a sufficient excuse for not furnishing to the persons in charge of the shipment of horses in question, in compliance with the contract of shipment, all proper facilities for taking care of them, nor for not stopping the car containing them there or at some other station, in compliance with the federal statute, so that they might be unloaded, watered and fed. So held in *Nashville, etc., Ry. Co. v. Heggie Bros.*, 86 Ga. 210, 12 S. E. 363.

Duty of Shipper to Load, Unload, and Care for Stock—Insufficient Yards at Destination.—Where the shipper of sheep, in consideration of reduced rates, is to care for them while in transit, and attend to loading and unloading them, and assume all risks incident thereto, and of all injuries from any cause, he cannot cast the duty upon the carrier of caring for the sheep after being unloaded at their destination, although its stock-yards were too small to hold them all. So held in *Myers v. Wabash, etc., Ry. Co.*, 90 Mo. 98, 2 S. W. 263.

c. Extra Charge.

And the carrier cannot lawfully charge shippers or consignees extra for the use of stock pens. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 49 Am. & Eng. R. Cas. 149.

d. Discrimination.

Of course a railroad, as a common carrier of live stock, cannot lawfully give one shipper a preference over others in respect to the use of stock-yards, any more than it is entitled to discriminate between shippers in regard to other matters connected with the carriage of freight. See *Missouri, K. & T. R. Co. v. Woods* (Tex. Civ. App.), 2 Am. & Eng. R. Cas., N. S., 519, 31 S. W. 237.

Stock-Yards Companies.—And in this connection, it may be stated that where a railroad company makes use of the pens of a stock-yards company, it cannot lawfully discriminate between such companies by contracting to deliver to a particular stock-yard all live stock coming over its line to a certain point, but is bound to transport over its road and deliver to all stock-yards at such point, reached by its tracks or

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connections, all live stock consigned, or which shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors. So held in *McCoy v. Cincinnati, Ind. & St. L. & C. R. Co.*, 13 Fed. Rep. 3.

Right to Refuse to Deliver at Other Yards in Same City—Discrimination.—But in *Central Stock-Yards Co. v. Louisville & N. R. Co.* (C. C. A.), 118 Fed. Rep. 113, it is held that where a carrier of live stock has provided reasonable facilities for the unloading and care of the stock, by building stock-yards of its own or by contract with a stock-yards company, its refusal to deliver stock to other stock-yards in the same city is not an unlawful discrimination, in violation of section 3 of the interstate commerce act. This decision is affirmed in *Central Stock-Yards Co. v. Louisville & N. R. Co.* (U. S.), 24 Sup. Ct. 239, 10 R. R. R. 555, 33 Am. & Eng. R. Cas., N. S., 555.

2. DEGREE OF CARE REQUIRED OF CARRIER.

a. Carrier as an Insurer.

Where animals in pens are in a railroad's exclusive possession, as a common carrier, it is as much the insurer of their safety as if they were in its cars. *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Houston & T. C. Ry. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, 3 R. R. R. 685, 26 Am. & Eng. R. Cas., N. S., 685; *Texas & P. Ry. Co. v. Turner* (Tex. Civ. App.), 37 S. W. 643; *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 74 S. W. 505, 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414. See also, note, 22 Am. & Eng. R. Cas., N. S., 89, et seq.

Received for Shipment.—The liability of a railroad, as a carrier, for the safety of cattle begins when they are received for shipment into its stock-pens. So held in *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

Delivery of live stock to a carrier is complete, so that its liability as such attaches, where the shipper applies to the carrier's freight agent for transportation, and, at his direction, places the animals in the usual place for receiving them for shipment, the agent being then notified thereof, and taking directions for their shipment. So held in *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 74 S. W. 505, 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414.

Stock Delivered in Carrier's Pens for Early Transportation.—When the delivery of live stock to a railroad company is made in its stock-pens, for early transportation, it becomes, the moment such delivery is made, a common carrier as to the stock, and its responsibility, as such, at once attaches. In such a case, the deposit of the stock in the pens is a mere accessory to the carriage, and does not postpone the carrier's liability, as a common carrier, to the time when the stock shall be actually put in motion towards their places of destination. So held in *Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473; *McCullough v. Wabash W. Ry. Co.*, 34 Mo. App. 23.

Transportation Delayed by Snow after Acceptance of Stock by Carrier—Loss from Exposure.—In *Feinberg v. Delaware, L. W. R. Co.*, 52 N. J. L. 451, 20 Atl. 33, it appeared that plaintiff's live stock, cows and calves, were accepted by defendant carrier, freight

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paid and receipt given, for transportation, without express contract or limitation, and, being delayed by a snow storm, were put in defendant's stock-yard, where some died, and others were injured, by cold and exposure to the weather. It was held that defendant was liable for the consequent damages as a common carrier, and it was not relieved from such liability by showing that the shipper's servant, riding on a free pass, given by the railroad's freight agent, accompanied the cattle.

Safety of Pens for Fat Hogs—Evidence.—A carrier of live stock is required to furnish pens where the animals can be safely kept while waiting to be loaded for transportation; and it is at least open to the jury to find that pens on ground sloping to the south, with no shade, shelter, or water thereon, and an embankment to the south, shutting off the breeze, are not safe pens for fat hogs during June. So held in *Lackland v. Chicago & A. R. Co.* (Mo. App.), 74 S. W. 505, 11 R. R. R. 414, 34 Am. & Eng., R. Cas., N. S., 414.

Icy Cattle Chute—Defense—General Storms.—It is no defense to an action for personal injury from the icy condition of a chute for loading stock on cars, that its condition was caused by the effects of a general storm. So held in *Kincaid v. Kansas City, etc., Ry. Co.*, 62 Mo. App. 365.

Loading Horse—Duty to Discover Defect in Pen Platform.—Even if a defect in a stock-pen platform from which a railroad company, as a carrier of live stock, is loading a horse upon a car would, under any circumstances, excuse the carrier for injuring the animal by reason of such defect, it would not do so in the absence of full diligence to discover the defects before exposing the horse to such risk of injury. So held in *East Tennessee Ry. Co. v. Herrman & Bro.*, 92 Ga. 384, 17 S. E. 344.

Salt Water in Pen—Loss of Lambs.—The law imposes upon a railroad company, holding itself out as a common carrier of live stock, the duty of furnishing suitable and safe stock-yards, both at the place of shipment and the place of destination, for receiving and discharging such live stock as is offered to it for shipment over its road; and if it permits salt water to be in such a pen accessible to lambs offered for shipment, it is guilty of negligence and liable for the consequent loss. So held in *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490.

Construction—Escape—Licensees.—Where the complaint stated that the defendant railroad company kept and maintained pens and yards for the reception of cattle to be shipped over its road; that, owing to the negligent manner in which they had been constructed by defendant, a certain number of cattle which had been placed in them, under authority from defendant, by plaintiffs' assignor escaped; and that plaintiffs thereby lost forty head of cattle, besides being put to expense. It was held, the allegations of the complaint having been sustained by the evidence, that the trial court properly refused to instruct that defendant could not be held to have taken possession of the cattle when they were placed in such pens and yard, and that plaintiffs were mere licensees in placing their cattle in such pens.

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Missouri K. & T. Ry. Co. v. Byrne (Ind. Terr. App.), 13 Am. & Eng. R. Cas., N. S., 17.

Reception of Hogs in Pens by Railroad—Delay.—The reception of hogs in the pens of a railroad company imposes upon the company the duty of transporting them without any unnecessary delay. So held in *Pruitt v. Hannibal & St. Jo. R. Co.*, 62 Mo. 527.

Duty to Keep until Delivery to Consignee.—Railroad companies, as carriers of live stock, must provide stock-yards and other accommodations whereby the stock can be safely and properly kept and cared for until delivery can be made to the consignee according to the terms of the contract of shipment. So held in *Myrick v. Michigan Cent. R. Co.*, 9 Biss. (U. S. Cir. Ct.) 44.

Liability Limited to Own Line—Refusal of Connecting Carrier to Receive—Hogs Placed in Pens.—But a common carrier which receives hogs consigned beyond its own route for carriage, but limits its liability to losses and injuries occurring on its own line, may on the refusal of the connecting carrier to receive the hogs for further transportation place them in pens, and by so doing shift its responsibility from that of a carrier to that of a warehouseman or forwarding agent, which is limited to the exercise of reasonable care. So held in *Larimore v. Chicago & A. R. Co.*, 65 Mo. App. 167.

Escape from Pen—Horses Injured—Carrier an Insurer.—In *Texas & P. Ry. Co. v. Turner* (Tex. Civ. App.), 37 S. W. 643, it appeared that the horses in question were unloaded from the defendant carrier's cars at one of its yards en route, and escaped from the pen in which defendant had placed them, and were damaged while at large. It was held that defendant was an insurer of the horses against damage from such a cause, and, therefore, plaintiff was not required, in order to recover, to show negligence on the part of defendant.

Cattle Reaching Destination at Midnight—Duty to Receive—Cold—Duty to Provide Inclosures—Termination of Carrier's Liability.—Tex. Rev. St., art. 4519, requires a railroad to have at each place of unloading freight suitable buildings and inclosures to protect the same from damages. The evidence showed that plaintiff's cattle reached their destination at midnight, and were then offered him upon payment of the freight. He did not have the money with him, and refused to receive the cattle that night, whereupon they were unloaded, and put in the company's pens. The weather was cold and wet, and the plaintiff, who was a stranger in the city, did not know where to take his cattle. It was held that the evidence supported the finding that the plaintiff was not obliged to receive the cattle when tendered under such circumstances, and, therefore, the railroad's liability as a carrier did not cease upon the unloading of the cattle. *Houston & T. C. Ry. Co. v. Trammell*, 28 Tex. Civ. App. 312, 68 S. W. 716, 3 R. R. R. 685, 26 Am. & Eng. R. Cas., N. S., 685.

Risk of Transportation Assumed by Shippers—Delay—Small Pens—Failure to Feed and Water.—In *Gulf, etc., Ry. Co. v. Frost* (Tex. Civ. App.), 34 S. W. 167, it appeared that the owners of stock agreed, prior to their shipment, to assume the risk of transportation, but that defendant railroad received the cattle, and, by reason of its inability

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to speedily forward them, unloaded them into small pens, and attempted to feed and water them through its own servants; and that the gates of the pens and hydrants were kept locked, so that the servants of the shippers could not take care of them. It was held proper to charge that, if the railroad accepted the stock for shipment, and unloaded them for feed and care, but neglected to take proper care of them, and the cattle were injured without fault of the shippers, the railroad was liable.

Low Pen Rack—Calf Injured—Inherent Vice Rule.—In *Gulf, etc., Ry. Co. v. Dunman* (Tex. Civ. App.), 81 S. W. 789, it appeared that a calf was injured in the racks of the pens provided by defendant railroad, during transportation, by reason of the negligence of defendant in making the racks so low that the calf could get into them. It was held that the railroad was not relieved of liability by the rule exempting carriers from liability for injuries to animals resulting from their inherent vices.

Muddy Pens—Duty to Furnish Feeding Place.—It is the duty of a railroad company, as a common carrier of live stock, to provide places where stock carried by it may be fed and watered in any kind of weather without injury, so far as this can be done by the use of proper care. Therefore, it was proper to refuse to instruct, "that if the defendant's pens furnished plaintiff's stock at Palestine were good and suitable in ordinary weather, but were muddy by reason of recent rains, then defendant would not be responsible for damages resulting from the condition of said pens." So held in *International & Great Northern Ry. Co. v. McRae*, 82 Tex. 614, 18 S. W. 672.

Platform for Unloading.—But in *Owen & McKinney v. Louisville & N. R. Co.*, 87 Ky. 626, 9 S. W. 698, it is held that it was the duty of the railroad company to furnish an ordinarily safe stock-pen platform to facilitate unloading, although it was the contract duty of the shipper to unload the animals, and the fact that the agent of the shipper was apprised of the danger from the unsafeness of the platform did not prevent the carrier from being liable for injury to the stock sustained through its failure to furnish a platform not ordinarily safe for the delivery of stock.

Duty under Texas Statute.—In *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948, it is held that, under article 4236, Tex. Rev. St., requiring railroad companies to erect at each station * * * "suitable buildings or inclosures to protect produce, wares and merchandise, and freight of every description," railroads must provide stock-pens for the protection of cattle tendered for shipment, sufficiently safe for the purpose indicated.

Injury to Cattle Awaiting Transportation—Mere Failure of Carrier to Receive Actual Notice of Their Arrival.—In *Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank* (Tex. Civ. App.), 81 S. W. 1050, it is held that a carrier is not relieved from liability for injury to cattle placed in its pens awaiting transportation, under an agreement with its agents that they were to be placed therein on a certain day, by the mere fact that the carrier did not have actual notice of the cattle having been placed in the pens on the day agreed upon, where the cattle were

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put in the pens on that day, and sustained injuries by reason of negligence with respect to the construction and maintenance of the pens.

b. When Carrier Not an Insurer.

Stock Placed in Railroad's Pens, by Its Permission, to Facilitate Loading or Unloading.—The rule is that a railroad company in permitting stock to be placed in the pens which it has prepared to facilitate loading and unloading does not thereby take possession of or assume charge of it as a common carrier. *Chicago, etc., R. Co. v. Powers* (Neb.), 103 N. W. 678, 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286; *Missouri, etc., Ry. Co. v. Byrne*, 40 C. C. A. 402, 18 Am. & Eng. R. Cas., N. S., 573, 100 Fed. Rep. 359; *Kansas City, etc., Ry. Co. v. Barnett*, 69 Ark. 150, 22 Am. & Eng. R. Cas., N. S., 81, 61 S. W. 919; *Fort Worth & D. C. Ry. Co. v. Riley* (Tex. App.), 1 S. W. 446; *International & G. N. R. Co. v. Earnest & Bost* (Tex. Civ. App.), 77 S. W. 29.

Construction of Pens.—A railroad company permitting stock to be placed in the pens which it has prepared by the side of its tracks to facilitate loading and unloading does not thereby receive it for shipment, or take possession or assume charge of it as a common carrier; and its only responsibility in this connection is for the exercise of ordinary care in the construction and maintenance of the pens. So held in *Missouri, etc., Ry. Co. v. Byrne*, 40 C. C. A. 402, 18 Am. & Eng. R. Cas., N. S., 573, 100 Fed. Rep. 359.

Placed in Pens Subject to Right of Removal for Water.—A railroad company which constructs yards by the side of its track to facilitate the loading and unloading of stock, is not responsible as a common carrier for stock placed in such yards for subsequent shipment, but subject to the right of the shipper to remove the stock from the pens for feed and water before the shipment is actually made. In such case the liability of the railroad company is no greater than that of an ordinary depositary or bailee. So held in *Chicago, etc., R. Co. v. Powers* (Neb.), 103 N. W. 678, 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286.

Acceptance of Shipment by Carrier—Placing in Pens—Sufficiency of Evidence.—In an action against a carrier for the escape of cattle from pens into which they had been put for the purpose of shipment, an instruction that the liability of the carrier for the safe keeping and damages to the cattle began when the same were put into its stock pens at the place of shipment, and received by the carrier for shipment, provided the carrier or its agent knew that the cattle were put therein for shipment over its line of railroad, was erroneous, where there was evidence that the cattle were not delivered or accepted for immediate shipment, and that the carrier refused to accept the cattle for shipment until the consignor loaded the cars with them. So held in *Kansas City, etc., Ry. Co. v. Barnett*, 69 Ark. 150, 22 Am. & Eng. R. Cas., N. S., 81, 61 S. W. 919.

Mere Permission to Place in Yards—Escape—Liability.—A mere permission by the agent of a railroad company to an owner of cattle to place the cattle in the company's yards, where no bill of lading is

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given, does not render the company liable for damages caused by the escape of the cattle. So held in *Fort Worth & D. C. Ry Co. v. Riley* (Tex. App.), 1 S. W. 446.

Failure to Maintain Stock Pens in Reasonably Secure Condition—Cattle Injured in Stampede.—In *Cooke v. Kansas City, etc., R. Co.*, 57 Mo. App. 471, it appeared that defendant railroad permitted the fences of its stock pens to become so rotten and out of repair that cattle placed therein for shipment over its road escaped, stampeded, and were thereby injured. It was held that defendant was responsible for the consequent damages, if it had failed to keep its stock pens in a reasonably safe and secure condition for the purposes for which they were intended. See also, *McCullough v. Wabash W. Ry. Co.*, 34 Mo. App. 23.

Boggy Pens—Absence of Troughs or Racks—Liability.—In *Missouri Pac. Ry. Co. v. Ivy*, 79 Tex. 444, 15 S. W. 692, it appeared that the pens furnished in which to unload plaintiff's stock for feed and water were boggy, supplied with no troughs or racks in which to feed, and the provender supplied by plaintiff was trampled in the muddy ground by the stock and did them little or no good. It was held that this evidence sufficiently showed that the stock was injured through the negligence of defendant in failing to furnish suitable pens, and warranted a verdict against the carrier.

Cattle Placed in Pens Too Soon—Heat and Absence of Food and Water—Liability.—Where a shipper places cattle in the carrier's pens several hours before the time agreed upon with the carrier for their departure, he cannot recover against the carrier railroad for their shrinkage in weight caused by heat and loss of food and water during that time. So held in *International & G. N. R. Co. v. Earnest & Bost* (Tex. Civ. App.), 77 S. W. 29.

3. PROXIMATE CAUSE.

Insecure Pen Gate—Stampede—Shipper Knocked Down While Fastening Gate with Rope.—In *Tex. & Pac. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162, it appeared that a railroad company knowingly permitted the gate of its stockpens to remain with defective fastenings; that a shipper placed his cattle in such pens to be loaded, and, while trying to fasten the gate with a rope, was knocked down and injured in a stampede of the cattle, caused by their alarm at a passing train. It was held that the shipper's injury was not a proximate result of the company's negligence with respect to the pens, but that the escape of the cattle was a proximate result of such negligence, and the railroad was liable for damages to the cattle resulting therefrom.

Icy Chute—Person Injured by Steer Knocked Down by Another Steer.—In *Kincaid v. Kansas City, etc., Ry. Co.*, 62 Mo. App. 365, it appeared that in loading cattle on an icy chute, one steer fell, knocking down a second, which fell upon plaintiff and injured him. It was held that the icy condition of the chute was the proximate cause of plaintiff's injury.

Injury from Failure to Provide Safe Yards at Shipping Point—Loss Occurring on Connecting Line—Initial Carrier's Liability Limited to Own Line.—Although the contract of shipment provides that the car-

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rier shall not be responsible for any injury to the stock until they are loaded into the car, and the car-door fastened by the conductor, and shall only be liable for the safe carriage and delivery of the stock to the next connecting carrier, yet if the injury which caused the loss was sustained at the shipping point before loading, through the failure of the carrier to provide safe and suitable stock-yards, such failure renders the carrier liable, though the loss actually occurred beyond the carrier's line. So held in *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, 22 S. E. 490, 495.

Yards Flooded—Loss of Cattle.—But in *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co. (C. C.)*, 135 Fed. Rep. 135, it appeared that defendant railroad had a large shipment of cattle owned by plaintiff to be taken over its line and delivered at A; that owing to floods, it was unable to reach that place with the shipment, and was also notified by the connecting carrier that it could not receive and forward the cattle from there, because of washouts on its line; that neither road had yards in which they could be placed at A., and defendant arranged with another company to forward them from K., and took them there, placing them in the stock-yards; that these yards had been in large use for many years, and, while the Kaw river, near them, was known to be very high, no flood had ever extended to the yards; but that on the night after the cattle were placed in such yards an unprecedented rise in the river occurred and flooded the stock-yards; and that, to prevent the cattle from drowning, they were driven into overhead viaducts leading from one portion of the yard to another, where they remained for more than a week, and a large number died from starvation, and the remainder were seriously injured. It was held that the proximate cause of the loss was the flood; and that defendant was not negligent in not anticipating it, nor was liable for the loss.

Escape from Pens—Bunching on Track.—And where the jury found that the bunching of nineteen cattle on the railroad track at night, at a point where they could have wandered off on the prairie, and their death from collision with a train was not the natural and probable consequences of the failure of the railroad company to use ordinary care to maintain its cattle pens, from which such cattle escaped, it was held that such finding could not be disregarded by the court, and was conclusive. *Missouri, etc., Ry. Co. v. Byrne*, 40 C. C. A. 402, 18 Am. & Eng. R. Cas., N. S., 573, 100 Fed. Rep. 359.

4. CONTRIBUTORY NEGLIGENCE.

Sagging Pen Gate—Failure of Shipper to Latch—Escape.—Owing to the defendant railroad's failure to furnish cars according to the promise of its agent, plaintiff was compelled to put his cattle in defendant's stock pen, the gate of which sagged so that it could not be latched without being lifted. The escape of the cattle was due to plaintiff's failure to lift the gate in order to latch it. And he had not called upon the defendant carrier to assist him in placing or securing them in the pen. It was held that the escape of the cattle was due to plaintiff's carelessness; and that there could be no recovery for loss

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resulting from their escape. *St. Louis, etc., Ry. Co. v. Law* (Ark.), 18 Am. & Eng. R. Cas., N. S., 286.

Muddy Pens—Cars Over-Loaded by Shipper's Employees—Cattle Slipping Down in Cars.—It appeared that some of plaintiff's cattle fell in the cars in consequence of having got wet and slippery in a mudhole in defendant's stock pen; but that they were loaded and cared for in transit by plaintiff's employees, who were given free transportation; that the stock was loaded fifty head to the car, when the capacity of the cars was but forty-five; and that plaintiff's employees abandoned the cattle before the destination was reached and while many of them were down in the cars. It was held that a finding of absence of contributory negligence should be set aside. *Missouri, etc., Ry. Co. v. Belcher* (Tex. Civ. App.), 41 S. W. 706.

Muddy Pens—Delay—Injury to Hogs—Acting with Knowledge.—Where plaintiff brought his hogs to defendant's railroad station after he had been informed by defendant's agent that it was uncertain exactly when cars for shipment of the hogs could be furnished, proof by plaintiff, in an action by him against defendant for damages from delay in transportation of the stock, as to the muddy condition of defendant's stock pens at the shipping point, was inadmissible. So held in *Illinois Cent. R. Co. v. Holt* (Ky.), 21 R. R. R. 455, 44 Am. & Eng. R. Cas., N. S., 455, 92 S. W. 540. In this case it appeared that plaintiff lived only a short distance from the station, and could easily have learned whether the cars had come before he drove his hogs to the pens.

Putting Cattle in Unsafe Pens.—But a shipper of live stock is not guilty of contributory negligence in putting them in the pens furnished by the carrier therefor till they are loaded for transportation, unless the pens are so obviously unsafe as to make it reasonably certain that injury to the animals must inevitably result. So held in *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414, 74 S. W. 505.

Using Icy Chute without Sanding.—A shipper was not guilty of contributory negligence in using an icy cattle chute without sanding it, as such duty devolved upon the carrier, unless its use was glaringly dangerous. So held in *Kincaid v. Kansas City, etc., Ry. Co.*, 62 Mo. App. 365.

Defective Stock Pens—Effect of Shipper's Knowledge.—And where stock tendered for shipment is placed in pens provided by the railroad company, it cannot relieve itself from liability for injuries resulting from defects in the pens of showing that the shipper had knowledge of such defects when he placed his cattle in the pens. *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473; *Gulf, etc., R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Galveston, etc., R. Co. v. Jackson* (Tex. Civ. App.), 37 S. W. 255; *East Line, etc., R. Co. v. Hall*, 64 Tex. 615.

Failure to Deliver in Daylight—Insufficient Pens—Cattle Turned Out and Herded by Shippers—Cattle Lost.—In *Gulf, C. & S. F. Ry. Co. v. York & Johnson*, 2 Tex. Ct. of App. Rep. § 813, it appeared that defendant carrier had promised to deliver the cattle at their desti-

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nation in daylight; that when it was ascertained they could not reach there until after dark, the shippers requested the carrier's agent to procure the use of the pens of another company at the depot, which were large enough to hold the cattle, defendant's pens being too small for such purpose, but this request was refused, and the cattle were driven into the small pens of defendant until they were trampling each other to death, when the shippers opened the gates and let them out; that they tried to herd them during the night, but many of them escaped into the woods, and eleven head were entirely lost, and one was killed in the pen. It is said in the opinion: "We have no doubt that appellees (the shippers) acted properly in turning their cattle out of the pens, and that the loss unavoidably resulting from their act was properly chargeable to appellants."

Cattle Placed in Pens—Refusal to Transport—Further Delivery Excused.—Where cattle intended for shipment are placed in the railroad company's stock-pens at a station on its road, the subsequent refusal of the company to receive and carry the cattle excuses any further delivery, or offer to deliver, for transportation, on the part of the shipper. So held in Louisville, etc., Ry. Co. v. Godman, 104 Ind. 490, 4 N. E. 163.

5. MISCELLANEOUS.

Muddy Pens.—In Gulf & S. F. Ry. Co. v. Porter, 25 Tex. Civ. App. Rep. 491, 61 S. W. 343, the evidence supported the verdict for damages in the transportation of certain cattle, by delay, rough handling, insufficient food and water, and muddy pens.

Cattle Held for Federal Inspection by Railroad as Depositary—Defective Gate—Escape—Killed by Train—Trespassers.—In Flint v. Boston & M. R. Co. (N. H.), 59 Atl. 938, it appeared that cattle intended for shipment were placed in the defendant carrier's pens, and held by defendant as a depositary until a United States inspection certificate could be obtained; that defendant's agent notified the shipper that one of the pen gates was defective, and that it would have to be nailed up, which the shipper did to such agent's satisfaction and in his presence; but the cattle broke out of the pen during the night, and some of them were killed. It was held that the cattle, after their escape, were not trespassers, either on the railroad company's other property, or on the highway from which they strayed onto the defendant's right of way.

Insecure Pens Furnished—Fence Broken Down by Derailed Car—Variance.—A general allegation in plaintiff's petition that the stock-pens in which defendant railroad placed his cattle and from which they escaped, were insecure, was sufficient, in the absence of special exception thereto, to admit evidence of insecurity from any cause; and where the evidence showed an independent cause, such as the breaking down of the fence by a derailed car of another road, a charge in relation thereto was not objectionable as being outside the issues. So held in Houston & Tex. Cent. Ry. Co. v. Trammell, 28 Tex. Civ. App. Rep. 312, 68 S. W. 716, 3 R. R. R. 685, 26 Am. & Eng. R. Cas., N. S., 685.

Failure to Keep Fence and Loading Chute in Repair—Delay—Refusal to Carry Alleged—Variance.—Evidence showing no wrong on

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the part of defendant railroad company except a failure to construct and keep in repair a proper fence around its stock-pens and a failure to keep the loading chute in proper repair, whereby cattle intended for shipment escaped from the pens, and their loading on the car was delayed until the train which was to carry them had left the station, will not support a recovery based on a complaint asking damages for a refusal to receive and carry the cattle. So held in Louisville, etc., Ry. Co. v. Godman, 104 Ind. 490, 4 N. E. 163.

Negligent Construction of Pens—Escape—Contract or Tort.—The complaint stated that the defendant railroad company kept and maintained pens and yards for the reception of cattle shipped over its road; that, owing to the negligent manner in which they had been constructed by defendant, a certain number of cattle which had been placed in them, under authority from defendant, by plaintiffs' assignor, escaped; and that plaintiffs thereby lost forty head of cattle, besides being put to expense. It was held that the action was not based on a contract, but was for a tort. Missouri, K. & T. Ry. Co. v. Byrne (Ind. Terr. App.), 13 Am. & Eng. R. Cas., N. S., 17.

A. R. Y.

SOUTHERN RY. CO. v. GULLAT.

(Supreme Court of Alabama, April 11, 1907.)

[43 So. Rep. 577.]

Evidence—Judicial Notice—Operation of Trains.*—The Supreme Court cannot take judicial notice that a train going at the rate of 20 to 25 miles an hour can be stopped within 80 or 90 yards.

Railroads—Injuries to Trespassers—Care Required.†—The operators of a train, discovering a trespasser standing or walking on the track, may assume that he will get off; and they are under no duty to attempt to stop the train until they discover that he cannot or will not get off.

Same.—A trespasser was lying down on the railroad track, and the engineer and fireman saw him 80 or 90 yards from where he was struck by the train. There was nothing to show that the train could

*For the authorities in this series on the subject of judicial notice of matters relating to railroads, see foot-notes appended to Southern Ry. Co. v. Blanford's Adm'x (Va.), 21 R. R. R. 646, 44 Am. & Eng. R. Cas., N. S., 646.

†For the authorities in this series on subject of the right of those operating cars or trains to assume that persons on or near tracks will avoid danger, see Heying v. United Rys. & Elec. Co. (Md.), 22 R. R. R. 673, 45 Am. & Eng. R. Cas., N. S., 673; foot-notes appended to Porter v. Missouri Pac. Ry. Co. (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 342; foot-notes appended to Eckhard v. St. Louis Transit Co. (Mo.), 21 R. R. R. 831, 44 Am. & Eng. R. Cas., N. S., 831; Schmidt v. Missouri Pac. Ry. Co. (Mo.), 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806; Birmingham, etc., Co. v. Clarke (Ala.), 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618; Illinois Cent. R. Co. v. Ackerman (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76.

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have been stopped in time to have saved him, or that the operators did not attempt to stop it as soon as they discovered his position. Held, that the railroad as a matter of law was not liable.

Trial—Scope of Evidence in Chief—Presumptions—Withholding Testimony.—Where plaintiff, on whom lies the burden of proof, fails to make out a case, it is not incumbent on defendant to introduce any evidence, and his failure to do so cannot create inferences to make out a case for plaintiff.

Appeal from Circuit Court, Jackson County; W. W. Harralson, Judge.

Action by Samuel Gullatt, as administrator, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action for killing a person on defendant's right of way or track. Demurrers were interposed to the first count, and sustained. The third count was charged out by the court. The second count alleged that plaintiff's intestate was on the track and in a position of peril from the approaching train; that the agents and servants of defendant saw the peril of the intestate in time to have avoided the injury, but negligently ran the train over and against him, killing him. Issue was joined on the general issue and a plea setting up that the servants of the defendant in charge of the train did not discover that plaintiff's intestate was in a position of peril and that he was ignorant thereof, and would not or could not extricate himself therefrom in time to prevent the injury sustained.

Humes & Speake, for appellant.

Bilbro & Moody, for appellee.

ANDERSON, J. The intestate was a trespasser on the defendant's track at the time he was killed, whether standing, walking, or lying down, and was at a point on the line where the defendant owed him no duty to keep a lookout, but owed him only the duty of using all reasonable efforts to prevent the injury after discovering his peril on the track, and after becoming aware that he could not or would not extricate himself therefrom. *Southern Ry. Co. v. Bush*, 122 Ala. 470, 26 South. 168; *Black's Case*, 89 Ala. 313, 8 South. 246; *Moorer's Case*, 116 Ala. 642, 22 South. 900. There was no proof in the case at bar that the intestate's peril was discovered in time to stop the train before striking him; nor were the facts sufficient to create an inference that would justify the refusal of the general charge for the defendant. There was no evidence that those in charge of the engine were looking forward at the time, or that, if they were, and could have seen the intestate, he was lying down and thus in a perilous position.

It is insisted that there was an inference that he was lying down, else the witness Kenemar would have seen him, and that the engineer and fireman must have seen him when they blew

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the whistle 80 or 90 yards from where he was struck by the train. Conceding that these facts create an inference, which we do not decide, that he was seen 80 or 90 yards from where he was struck, and that he was lying down, there was no proof that the train could have been stopped in time to have saved him. This court cannot take judicial knowledge of the fact that a train going at the rate of 20 or 25 miles an hour could have stopped within 80 or 90 yards. Therefore the general charge, requested by the defendant, should have been given. It is true we may, as a matter of common knowledge, know that, if the trainmen made the proper efforts to check the train when the alarm was given by the blowing of the whistle, the speed would have been reduced; but, if he was not lying on the track when discovered, they had the right to assume that he would get off, and were under no duty to attempt to stop the train until they discovered that he could not or would not get off. On the other hand, if he was lying down on the track, nothing short of stopping the train before it reached him could have saved him. Moreover, there is nothing to show that they did not attempt to stop the train as soon as they blew the whistle. *Bush's Case, supra*; *Nave v. A. G. S. R. R.*, 96 Ala. 264, 11 South. 391.

It is insisted by counsel for appellee that the defendant's failure to put the engineer Anderson on the stand, who was present at the trial, and examine him, "reinforces the inference that the intestate was on the track and that his death could have been avoided," and cited the dissenting opinion of Tyson, J., in the case of *Brock v. State*, 123 Ala. 24, 26 South. 329, and authorities elsewhere. The question considered in the case has no application to the case at bar, and it is needless for us to comment on the principle involved. We merely add that the failure to examine the witness in the case at bar could not prevent the general charge for the defendant, if the plaintiff had failed to make out his case. When the plaintiff, upon whom lies the burden of proof, fails to make out his case, it is not incumbent upon the defendant to introduce any evidence, and his failure to do so should not create inferences for the purposes of making out a case for the plaintiff after he had failed to make out one for himself.

Reversed and remanded.

TYSON, C. J. and DOWDELL and McCLELAN, JJ., concur.

WILMOT et al. v. OREGON R. Co.

(Supreme Court of Oregon, Nov. 21, 1906.)

[87 Pac. Rep. 528.]

Railroads—Killing Animals—Fencing Track—Statutes—Application.—B. & C. Comp. § 5139, making railroad companies liable for the value of stock killed by moving trains, engines, or cars on or near an unfenced track, does not extend to depot grounds, which railroad companies are not required to fence.

Same—Question for Court and Jury.—Whether a railroad company is required by B. & C. Comp. § 5139, making it liable for stock killed where a track is unfenced, to fence its track at depot grounds, is a question of law for the court, and where the evidence is conflicting as to whether the point where plaintiffs' animals strayed onto the track was a part of the railroad's depot grounds, such question is for the jury.

Same—Depot Grounds—Extent.*—The depot or station grounds of a railroad company is the place where passengers get on or off the train, and where freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches, and turnouts thereon, or adjacent thereto, necessary for handling and making up trains, storage of cars, etc., and so much of the main track outside the switches as is necessary for the proper handling of trains at the station.

Same—Survey.—Where grounds have been appropriated, surveyed, and set apart by a railroad company for station or depot purposes, such appropriation affords strong evidence that their boundaries are such as and no more than are necessary and proper.

Same—Contributory Negligence—Question for Jury.—In an action against a railroad company for killing plaintiffs' horses, whether plaintiffs were guilty of contributory negligence in turning the horses out to graze on unenclosed lands near defendant's depot, was for the jury.

Action from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by Frank Wilmot and others against the Oregon Railroad Company. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

George W. Joseph, for appellants.

Arthur C. Spencer, for respondent.

BEAN, C. J. This is an action to recover the value of four horses killed by the moving trains of the defendant on an unfenced portion of its track, but which the plaintiffs claimed and allege should have been fenced.

The complaint states a cause of action for common-law negli-

*See foot-notes appended to *Bird v. Michigan Cent. R. Co.* (Mich.), 21 R. R. R. 622, 44 Am. & Eng. R. Cas., N. S., 622.

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gence, and also under the statute making a railway company liable for stock killed on an unfenced track. The court below, in accordance with the doctrine approved by *Harvey v. Southern Pacific Co.*, 46 Or. 505. 80 Pac. 1061, required plaintiffs to elect upon which cause of action they would proceed, and they elected to rely upon the statutory liability. The defense is that the animals entered upon the track at the depot grounds of the defendant, and that plaintiffs were guilty of such contributory negligence in suffering and permitting them to run at large at the place where they were killed as will bar a recovery. The defendant owns and operates a railroad from Portland to the eastern boundary of the state. Bridal Veil is a station between Portland and The Dalles, used principally for the shipment of lumber. It consists of station grounds, a depot building, side tracks, switches, and turnouts necessary and proper for the handling of the business at that point. A switch or side track used by it in the transaction of its business leaves the main track at a point 200 or 300 feet east of the depot building, and passing south of such building, intersects the main track again about 1,800 feet west thereof. Along this side track are situated the planing mill, lumber yards, sheds, and other buildings of the lumber company. In 1902, the defendant constructed on the north side of the main track a passing track 3,000 feet long which commences about 700 or 800 feet west of the depot building and opposite the lumber platform of the lumber company and extends about 2,200 feet east of the depot. About 100 feet east of this passing track the defendant constructed a cattle guard with fences connected therewith on either side. From this point east the track is fenced, but it is not inclosed between the cattle guard and the west end of the depot grounds. The plaintiffs live and are in business at Bridal Veil. On the evening of April 11, 1904, they turned their horses out to graze on the uninclosed lands south of the depot as they had been accustomed to do for some time. During the night the horses strayed onto the track of the defendant, and were killed by its moving trains. The evidence tended to show that the horses entered upon the tract west of the east end of the passing track, but were run down and killed east of the cattle guard. The court below directed a nonsuit on the ground that the place of entry was within the depot grounds of the defendant and at a place it was not required to fence. The statute makes a railroad company liable for the value of stock killed by its moving trains, engines, or cars, upon or near an unfenced track (B. & C. Comp. § 5139), and is broad enough to include animals killed at the depot grounds. It has, however, been held that the statute did not extend to depot grounds because the purpose for which they are used, and the right of public convenience are inconsistent with the obligation to fence at that point. *Moses v. Southern Pacific Co.*, 18 Or. 385, 23 Pac. 498, 8 L. R. A. 135; *Sullivan v. O. R. & N. Co.*, 19 Or. 319, 24 Pac. 408.

The question for decision upon the trial, therefore, was

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whether the place where the animals of the plaintiffs entered upon the track of the defendant was within or without the depot grounds. If within the depot grounds, the plaintiffs cannot recover in this action, but if not, defendant is liable under the statute unless the plaintiffs were guilty of contributory negligence. The parties differ radically as to whether the question thus presented is one of law or of fact. The plaintiffs claim that it was a question of fact, and should have been submitted to the jury, while the defendant insists that it was a matter of law for the court. The rule is, we take it, that whether a railway company shall fence its track at its depot grounds is a question of law and, if the testimony shows that animals entering upon such grounds are injured or killed by moving trains, the owner cannot recover under the statute, and the liability of the company is for the court. *Moses v. Southern Pac. Co.*, 18 Or. 385, 23 Pac. 498, 8 L. R. A. 155; *Eaton v. Oregon R. & Nav. Co.*, 19 Or. 371, 391, 24 Pac. 413; *Eaton v. McNeil*, 31 Or. 128, 49 Pac. 875; *Harvey v. Southern Pac. Co.*, 46 Or. 505, 80 Pac. 1061. But it is often a disputed question as to whether a certain point constitutes a part of the depot grounds, and if the evidence is conflicting or different inferences may be drawn from it, the question is for the jury, and not the court. Mr. Elliott says: "While it is purely a question of law whether or not a railway company shall fence at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is a question of fact whether a certain point constitutes part of the depot grounds or whether the erection of a fence at any particular place would interfere with the company's employees in the performance of their duties." 3 Elliott, Railroads, § 1202. In *Grosse v. Chicago & Northwestern R. Co.*, 91 Wis. 482, 65 N. W. 185, the unfenced portion of the right of way was half a mile in length and extended north beyond a switch which was 1,400 feet from the depot building. At a highway crossing a short distance south of the switch it was customary to load and unload freight. Between such crossing and the switch, plaintiff's colts came upon the right of way and were killed, and it was held that it was a question for the jury whether the place of entry was a part of the depot grounds. In *Rhines v. Chicago, & Northwestern R. Co.*, 75 Iowa 597, 39 N. W. 912, it was held that whether part of the company's ground which was not the ordinary place of receiving or delivering freight, but where freight of a single shipper was handled, should be left unfenced, was a question of fact for the jury. And, in *Dinwoodie v. Chicago, etc., Ry. Co.*, 70 Wis. 160, 35 N. W. 296, it was likewise held to be a question of fact whether the defendant's right of way at a point 60 rods from the station building where there was a side track in addition to the main track was necessary and convenient and actually used for loading and unloading freight so as to make it a part of the depot grounds, thus relieving the company from the duty of fencing it. And in *Bean v. St. Louis, Iron Mountain & So. Ry. Co.*, 20 Mo. App. 641, it was ruled

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a place used by the railroad for switching purposes in connection with its station grounds, the court could not declare as a matter of law that the company was not bound to fence its track at that point. See, also, *Indiana, etc., Ry. Co. v. Hale*, 93 Ind. 79; *Chicago, etc., Ry. Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986; *McDonough v. Milwaukee, etc., Ry. Co.*, 73 Wis. 223, 40 N. W. 806. The depot or station grounds of a railway company is the place where passengers get on and off the trains and where freight is loaded and unloaded, and includes all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches, and turnouts thereon or adjacent thereto for handling and making up trains, storage of cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station: 3 Words & Phrases, 2005 *et seq.*; 9 Am. & Eng. Law (2d Ed.) 367; *Groose v. Chicago, etc., Ry. Co.*, 91 Wis. 482, 65 N. W. 185; *Grondin v. Duluth, etc., Ry. Co.*, 100 Mich. 508, 59 N. W. 229. And where grounds have been appropriated, surveyed, and set apart by the railway company for station or depot purposes, it affords very strong, if not conclusive, evidence that their boundaries and extent are such as and no more than are necessary and proper, and their limits should not be curtailed or extended by the court or jury unless in a very clear case: 3 Elliott, Railroads, § 1194; *Chicago, etc., Ry. Co. v. Campbell*, 47 Mich. 265, 11 N. W. 152; *McGrath v. Detroit, etc., Ry. Co.*, 57 Mich. 555, 24 N. W. 854; *Rabidon v. Chicago, etc., Ry. Co.*, 115 Mich. 390, 73 N. W. 386, 39 L. R. A. 405.

Now, there was no evidence in this case that the place where the plaintiffs' horses entered upon defendant's track was within the limits of the station grounds, as set aside and designated by the defendant, or within such grounds, as hereinbefore defined, and therefore the court could not declare as a matter of law that defendant was not required to fence its track at such point. The north track constructed by the defendant in 1902, so far as the evidence shows, was intended to be used for the passing of trains, and was in no way connected with or necessary to the use of the depot grounds; nor, indeed, that it was on such grounds. We think, therefore, that the question whether the point where the horses entered was within the depot grounds was a question for the jury, and should have been submitted to them. A claim is made that plaintiffs were guilty of contributory negligence in turning their horses out to graze upon the uninclosed lands near the depot, but whether this was such contributory negligence under the circumstances as will defeat a recovery was for the jury. *Moses v. S. P. Co.*, *supra*; 2 Thomp. Neg. § 2004.

Judgment reversed, and new trial ordered.

WILLIAMS *v.* CHICAGO, B. & Q. RY. CO.

(Supreme Court of Nebraska, April 4, 1907.)

[111 N. W. Rep. 596.]

Railroads—Operation—Accidents at Crossings.*—Ordinarily a railroad company is not liable for injuries caused by a team taking fright at the noises incident to the ordinary operation of a train on its road.

Same—Care Required.*—But, where the conditions are such that noises thus made would endanger a person at a public crossing, which result could be avoided by temporarily staying or suspending the noise without materially interfering with the due operation of the train, ordinary care and prudence require that it be thus stayed or suspended until the danger is past.

Same.*—To turn on the steam of a locomotive standing at a public street crossing, without warning and without taking due precautions to discover whether there is any person on or near the crossing liable to be injured in consequence of such act, constitutes actionable negligence, in the absence of special circumstances justifying the act.

Same.†—A train standing at a public crossing has no precedence over an ordinary traveler; their rights being equal. Each is bound to act with due regard to the other and has a right to assume that the other will be controlled by such considerations as would influence the conduct of a man of ordinary care and prudence.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Appeal from District Court, York County; Evans, Judge.

Action by Benjamin F. Williams against the Chicago, Burlington & Quincy Railway Company. From a judgment in favor of plaintiff defendant appeals. Affirmed.

J. W. Deweese, F. E. Bishop, and F. C. Power, for appellant.
Gilbert Bros., for appellee.

ALBERT, C. This is an appeal from a judgment in favor of the plaintiff in an action brought to recover for injuries received by him in consequence of the team, drawing the wagon in which he was riding, taking fright at the escape of steam from one of the defendant's locomotives standing at a street crossing. At the close of the testimony the defendant moved for the direction of

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams, see foot-notes appended to *Baltimore, etc., R. Co. v. Slaughter* (Ind.), 22 R. R. R. 333, 45 Am. & Eng. R. Cas., N. S., 333; foot-notes appended to *Louisville & N. R. Co. v. Sights* (Ky.), 21 R. R. R. 856, 44 Am. & Eng. R. Cas., N. S., 856.

†For the authorities in this series on the subject of the right of persons about to cross railroad tracks to assume that those in charge of trains of cars will perform their duties, see foot-notes appended to *Elgin, etc., Ry. Co. v. Hoadley* (Ill.), 22 R. R. R. 663, 45 Am. & Eng. R. Cas., N. S., 663.

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a verdict in its favor. The motion was overruled, and the ruling on that motion is the basis of the only assignment argued in the brief filed on behalf of the defendant company. The question raised by the assignment relied upon is whether the evidence, tested by the rules of law applicable thereto is sufficient to sustain the verdict.

The crossing in question is one of the principal streets in the city of New York. Six railroad tracks of the defendant company cross the street at this point. The street is 100 feet wide, runs north and south, and the tracks cross it nearly at right angles. From the center of the street the crossing is planked for a distance of about 15 or 16 feet each way. There is an ordinary sidewalk at each side of the street. The rest of the crossing is neither planked nor filed in, the rails projecting above the surface of the street about four inches. On the date of the accident the plaintiff and his brother approached the crossing from the south, in a wagon drawn by a team of mules. One of the defendant's locomotives, to which was attached four or five freight cars, stood near the east line of the street, facing west. There is some conflict in the evidence as to whether the locomotive, or any part of it, stood on the street; the plaintiff and one other witness testifying that the pilot was even with the east line of the planking on the crossing, and witnesses produced by the defendant testifying that the locomotive stood east, and entirely clear of the street. There is also some conflict as to the time it had stood at the crossing, but the evidence would warrant a finding that it was at least five minutes. The plaintiff and his brother, as they approached the crossing, and at a distance of about six blocks from it, saw the locomotive standing on the track, and it was in plain sight all the time. At a short distance from the track they "slowed up," or stopped for an instant, to consider whether it would be safe to cross in front of the locomotive. They saw or heard nothing to indicate that the locomotive was about to move, and received no warning that it was about to do so. They saw others crossing, and started to drive across the tracks. The engineer could not see them from his side of the cab, but the fireman, from the other side of the cab, might have seen them, if he had been looking. His testimony was not taken. When the mules had got about in front of the engine, the engineer turned on the steam to back the train. This caused considerable noise, and the team took fright and started in a northwesterly direction, which brought the wagon wheels in contact with the rails of the unplanked portion of the crossing. What followed is shown by the following taken from the plaintiff's testimony: "The team started with us. My brother was driving and I took hold of the lines, too, and the team ran out over those unprotected rails, and the wagon was just bouncing up and down, and we came to the sewer that goes under the railroad and the team would not go over that hole. They turned and ran over a kind of guard they have there by the sidewalk—old ties with planks spiked on top of these ties. When we struck these planks, about 18 inches high, it just shot us into the

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air 15 or 20 feet, and we came over on our heads. At that time the wagon was gone from where we were." That the accident resulted in more or less injury to the plaintiff is not disputed. The evidence also shows that the engineer turned on the steam in response to a signal from one of the trainmen to back the train, and that the escape of the steam, with the consequent noise, was merely incidental to the usual and ordinary operation of the engine. The evidence, however, is sufficient to sustain a finding that while the plaintiff was crossing the track in front of the defendant's engine, which was occupying a portion of the public street, the defendant's employees, without any warning and without any precaution to guard against consequent injury to those using the street, turned on the steam, thereby causing a noise, which, by common experience, is known to be highly calculated to frighten teams passing in front of an engine, and in consequence the plaintiff sustained serious bodily injury. This in our opinion, sustains, the charge of negligence.

We have not overlooked the general rule applied in *Hendricks v. F., E. & M. V. R. Co.*, 67 Neb. 120, 93 N. W. 141, to the effect that a railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train on its road. While that rule is generally recognized by the courts, we know of no case where any court has shown a disposition to depart from the humane doctrine that a person must conduct his business with due regard for the safety of others. Noise is an unavoidable incident to the operation of railroad trains. But where the conditions are such that the noise incident to the movement of a train or engine would endanger those lawfully near the track, and could be temporarily stayed or suspended without materially interfering with the due operation of the road, ordinary prudence and a due regard for the rights and safety of other people demand that the noise be prevented or suspended until the danger is past. This is clearly implied in *O. & R. V. R. Co. v. Brady*, 39 Neb. 28, 57 N. W. 769. In that case, as in this, a team took fright at the escape of steam from an engine; and in the body of the opinion the court said: "If the facts, circumstances, and situation of the parties had been such, at the time this steam escaped, as to make it the duty of the engineer to be aware of Brady's presence, then the engineer's act of opening the valves would have been evidence of negligence for the jury's consideration." In *O. & R. V. R. Co. v. Clark*, 39 Neb. 65, 57 N. W. 545, the same question was under consideration; and the court, in the course of its discussion, said: "* * * In the legitimate conduct of its [railroad's] business, it had a right to discharge steam from its locomotive, even within the limits of a city and near traveled thoroughfares, provided in doing so it acted as a person of prudence would act under similar circumstances." In *L. & N. R. Co. v. Penrods* (Ky.) 66 S. W. 1013, the court held that it was negligence to make the customary noises incident to the movement of a train, when the employees in charge had reason to fear injury there-

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from to the driver of a team. *T. W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489. In the last two cases it would seem that the engineer had seen the perilous position of the occupants of the wagon, whereas in the case at bar the evidence is that he did not. We lay no stress on that distinction between the cases. The defendant's liability does not depend alone on what its employees saw, but on what, under the circumstances, they might have seen and should have seen. The fireman at least might have seen the plaintiff's peril, and, in view of all the circumstances, it was certainly the duty of some one engaged in operating the train to see. The engine was occupying a portion of a public street, where teams were passing and repassing within a few feet of the pilot. Those in charge of it knew, or ought to have known, as a matter of common experience, the effect of escaping steam on an ordinary team passing near an engine. They knew the condition of the crossing, and that only a portion of it was planked. The accident is one which might have been easily foreseen by ordinary forecast as a natural and probable result of turning on the steam, and one which could have been prevented by the exercise of slight care on the part of the defendant's employees, without substantial interference with the due operation of the road. We are satisfied that in view of the situation of the parties, and the attendant facts and circumstances, the turning on of the steam, without taking any precaution to guard against injury therefrom to those using the crossing, was actionable negligence.

But the defendant contends that the evidence shows contributory negligence on the part of the plaintiff. We do not think so. The facts relied upon to show contributory negligence are that the plaintiff and his companion might have taken a different route after they saw the engine on the street, and that they attempted to cross the track without taking any precaution to find out whether the train, or engine, was about to move. Their direct route lay across these tracks. The other route meant going out of their way a total distance of about five blocks. They saw other teams passing in front of the engine. They had no warning that it was about to move. Ordinary care does not demand that one in lawful use of a highway and driving a team should dismount and make inquiries in regard to the intentions of those in charge of a locomotive standing at a crossing, or to abandon his route in apprehension that those in charge of the engine will operate it in reckless disregard of his safety. He has a right to assume that they will act with ordinary care, and with due regard for the safety of those using the crossing. A train standing at a crossing has no precedence over an ordinary traveler; their rights being equal. Each is bound to act with due regard to the other. *Allen v. Boston & M. R. Co.*, 47 Atl. 917, 94 Me. 402. Each has a right to assume that the other will act as a man of ordinary care and prudence would act in like circumstances. A person attempting to cross the tracks at a railroad crossing is put upon his judgment. The act is generally attended with more or

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less risk, and he has a right to act upon conditions as they would appear to a man of ordinary intelligence and prudence, and on the assumption that those engaged in operating the road will not needlessly enhance his danger.

It is our opinion the evidence is amply sufficient to sustain the verdict of the jury, and we therefore recommend that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

LOUISVILLE & N. R. Co. v. FARRIS.

(Court of Appeals of Kentucky, March 19, 1907.)

[100 S. W. Rep. 870.]

Railroads—Operation—Personal Injuries—Trespassers.*—Where a car was left on a siding to have a safe unloaded therefrom, a person, who went on the car to help unload it and was injured, was not a trespasser.

Same—Licensee—Care of Railroad Company.†—Where a car was left on a siding to be unloaded, and a train was backed on a siding, and the car moved without warning, one engaged in unloading the car is entitled to recover for an injury, though it resulted from the uncoupling of the cars through a latent defect which could not have been discovered by ordinary care.

Same.—Where a railroad company, before moving a car, notified one engaged in unloading it to get off it, he did not, the company is not liable for resulting injury to him.

Damages—Measure—Personal Injuries.—In an action for personal injuries, where the petition had no allegation as to loss of time or expense of care, and the evidence did not show any permanent impairment of plaintiff's power to earn money, an instruction, authorizing an award of such damages as would reasonably compensate him for the injury, including his suffering, not exceeding the amount claimed in the petition, was erroneous.

*For the authorities in this series on the question, who are and are not, licensees, see foot-notes appended to *Keller v. Erie R. Co.* (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; foot-notes appended to *Peterson v. South & W. R. R.* (N. Car.), 22 R. R. R. 355, 45 Am. & Eng. R. Cas., N. S., 355.

†For the authorities in this series on the subject of the care due licensees, see foot-notes appended to *Peterson v. South & W. R. R.* (N. Car.), 22 R. R. R. 355, 45 Am. & Eng. R. Cas., N. S., 355.

For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to persons, other than passengers, at stations and depots on business, see foot-notes appended to *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312; *Croft v. Chicago, etc., Ry. Co.* (Iowa), 21 R. R. R. 583, 44 Am. & Eng. R. Cas., N. S., 583.

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Appeal from Circuit Court, Garrard County.

"Not to be officially reported."

Action by William Farris against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John T. Shelby, Lewis L. Walker, and Benjamin D. Warfield, for appellant.

James I. Hamilton and W. I. Williams, for appellee.

HOBSON, J. The National Bank of Lancaster had a safe in one of the cars of the Louisville & Nashville Railroad Company at its station at Lancaster. The car had been placed upon the side track that the safe might be unloaded. The bank hired some men for the purpose of taking the safe out of the car, and among them William Farris. After they had gotten the safe from the end of the car to the door, the wagon was sent away for some heavier timbers, and while it was gone, Farris and some of the other men waited in the car for the return of the wagon, and, according to his testimony, were directed to wait there and get some timbers to chock the safe. While they were waiting, the local freight pulled in, and it was necessary to move the car in order to do some switching it had to do. The men in charge of the freight backed in on the side track, coupled onto the car, and backed it back to some other cars on the side track and coupled onto them. They then pulled out; but, as they were going along, in some way the rear cars of the train pulled loose from those in front. The conductor, not perceiving this, gave the engineer a stop signal. The engine stopped, and the rear cars that were loose ran down upon the cars that were attached to the engine, before the engine could be started again so as to pull the train out of their way. In the collision, the safe was knocked over and fell upon Farris' leg, inflicting a painful flesh wound, from which he was laid up some weeks and was not able to work something longer. There was a sharp conflict in the testimony. The evidence for the defendant was to the effect that the conductor of the train went to the car to shut the door, and told the men to get out before he coupled onto it; that they all got out, and it tended to show that Farris afterwards got back into the car. The evidence for the plaintiff was to the effect that they helped the conductor close the door of the car, and that he said nothing to them about getting out. The court instructed the jury as follows: "(1) If you believe, from the evidence in the case, that the defendant, by its employees, set the car containing the safe for the purpose of the removal of the safe, or permitted it to be set, and that thereafter the plaintiff, under his employment to help move the safe from the car, was engaged in his duties of preparing said safe to be moved out, and that, while so engaged, the defendant, by its employees, negligently ran one or more cars against or negligently permitted

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them to run onto or against, the car in which plaintiff was so engaged, and thereby inflicted personal injury upon the plaintiff, then you will find for the plaintiff such an amount in damages against the defendant as will reasonably compensate him for the injury, including any suffering he endured, if any, not exceeding the sum of \$2,000, and, unless you so believe, you will find for the defendant. (2) Although you may believe from the evidence that the defendant was guilty of negligence under instruction No. 1, yet, if you further believe from the evidence that, before said cars were removed, and before the two or more cars were run on or to or upon, or permitted to be run to or upon, the car containing the safe in which the plaintiff was injured, the defendant's conductor warned the plaintiff and informed him that he should leave the car because he was preparing to move it, then it was the duty of plaintiff to have left same, and the law in that event is for the defendant, and you will so find." The jury found for the plaintiff, and fixed his damages at \$500. Judgment was entered upon the verdict, and the defendant appeals.

The court properly refused to instruct the jury upon the idea that the plaintiff was a trespasser upon the car, or to the effect that the defendant was not responsible, if the cars became uncoupled through some latent defect which could not be discovered by the use of ordinary care. The defendant had placed the car on the side track for the purpose of the safe being unloaded from the car by the servants of the bank, and that the fact that they were there unloading the safe was known to those in charge of the train. When those in charge of the train undertook to move the car, under these circumstances, if they failed to notify the men in the car to get out, the defendant is responsible to the plaintiff if he was injured by reason of a collision between the cars when the defendant was moving them as above stated. On the other hand, if the conductor warned the plaintiff to leave the car, as he was preparing to move it, the plaintiff remained in the car at his own risk, and the defendant is not liable. In other words, if the defendant moved the car without notice to the plaintiff to get out, it took the risk; but if it notified him to get out, and he remained in the car, or returned to it after getting out, he took the risk.

Instruction 1 is, however, erroneous, in not properly stating to the jury the measure of damages. There was no allegation in the petition of loss of time or expense in cure, and the evidence did not show any permanent impairment of the plaintiff's power to earn money. The proper measure of damages in a case like this was laid down in *L. & N. R. R. Co. v. Logsdon*, 114 Ky. 752, 71 S. W. 905; *L. & N. R. R. Co. v. Mason*, 72 S. W. 27, 24 Ky. Law Rep. 1625; *Lexington Ry. Co. v. Herring* (Ky.) 96 S. W. 558. The case of *L. & N. R. R. Co. v. Cooper*, 65 S. W. 795, 23 Ky. Law Rep. 1658, does not apply, as in this case the defendant asked an instruction on the measure of damages, and, though that instruction was not correct, the court, when

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his attention was called to the subject, should have given a correct instruction on it. See *L. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233.

On the return of the case to the circuit court, the plaintiff may be allowed to amend his petition if he desires to do so.

Judgment reversed, and cause remanded for a new trial.

BOLLINGTON v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, March 22, 1907.)

[100 S. W. Rep. 850.]

Master and Servant—Injuries to Servant—Knowledge—Assumed Risk.*—Plaintiff, a boy 19 years of age, while mixing a bucket of lime and water for the purpose of making whitewash to use on the outbuildings of defendant railroad company, was injured by an explosion of the lime. He alleged that he had had but little or no experience in mixing lime and water, did not know it would explode, and that defendant was negligent in failing to warn or instruct him. Held that, as the liability of lime to explode when mixed with water is a matter of ordinary common knowledge, plaintiff assumed the risk thereof without special warning or instruction.

Appeal from Circuit Court, Boone County.

"To be officially reported."

Action by Grover Bollington, by his next friend, etc., against

*For the authorities in this series on the subject of the duty to warn and instruct employees, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361; *Richards v. Sloss-Sheffield Steel & Iron Co.* (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36; foot-notes appended to *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225.

For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Gulf, etc., Ry. Co. v. Huyett* (Tex.), 22 R. R. R. 637, 45 Am. & Eng. R. Cas., N. S., 637; foot-notes appended to *Arenschield v. Chicago, etc., Ry. Co.* (Iowa), 22 R. R. R. 41, 45 Am. & Eng. R. Cas., N. S., 41; foot-notes appended to *Kennedy v. Kansas City, etc., R. Co.* (Mo.), 21 R. R. R. 818, 44 Am. & Eng. R. Cas., N. S., 818; foot-notes appended to *Graham v. Chicago, etc., R. Co.* (Tex.), 21 R. R. R. 549, 44 Am. & Eng. R. Cas., N. S., 549; *Farney v. Oregon Short Line R. Co.* (Utah), 21 R. R. R. 529, 44 Am. & Eng. R. Cas., N. S., 529; foot-notes appended to *Anderson v. Northern Pac. Ry. Co.* (Mont.), 21 R. R. R. 23, 44 Am. & Eng. R. Cas., N. S., 23; *Mumford v. Chicago, etc., Ry. Co.* (Iowa), 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431; foot-notes appended to *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225; *Root v. Kansas City So. Ry. Co.* (Mo.), 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171; *Drake v. San Antonio & A. P. Ry. Co.* (Tex.), 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157; *Wagner v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187.

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the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

T. E. Gurley, for appellant.

Benjamin D. Warfield and Jno. S. Gaunt, for appellee.

TERRIL, Special Judge. This action was brought by appellant, Grover Bollington, by his next friend, N. G. Bollington, against the appellee, the Louisville & Nashville Railroad Company, in which he seeks to recover damages from appellee for personal injuries alleged to have been sustained while in its employment, and by reason of its negligence and carelessness.

Appellant alleges in his petition and amendments that while in the employ of the appellee he was ordered by appellee, and its servants superior in authority to him, to mix quantities of lime and water for the purpose of making whitewash, to whitewash the outbuildings of appellee; that while so engaged, and without any warning, the lime exploded, throwing quantities of lime and water in his eyes, and from the effect of which he lost the use of one eye, and the other has been materially injured; that appellee knew that lime and water when confined in mixing would explode; that appellant, being only 19 years of age, and having but little or no experience in handling or mixing lime and water, did not know it would explode, and that appellee and its servant in charge of him knew of said danger, and failed to warn or instruct him, by reason of which he was injured. The court below sustained a demurrer to appellant's petition and amendments, and its ruling is now before this court for review.

There is no complaint on the part of the appellant as to the kind or character of the material furnished him to use. It is not alleged that the material or appliances furnished by the appellee was not the best, nor does the petition or amendments thereto allege that the lime used was not slacked. The negligence charged is that it knew of the dangers of mixing lime and water, and it failed and neglected to warn or instruct appellant of the danger. That the servant assumes the ordinary risks and dangers incident to the character of service he is engaged to perform is a well-established and settled rule. Bollington was 19 years of age, and was employed by appellee in the maintenance of its tracks and ways, and of ordinary capacity and intelligence, and had experience in the service incident to his employment. In the case of *C., N. O. & T. P. Co.'s Receiver v. Finnell's Adm'r*, 108 Ky. 139, 55 S. W. 902, 57 L. R. A. 266, this court said: "The rule is that a minor in entering the service assumes like the adult the risk of that service, unless too young to appreciate the peril to which he is exposed." The general rule is that the servant assumes all the risk ordinarily incident to his employment, and, in accepting service, he not only assumes the risk reasonably to be anticipated as incident to it, but he also assumes that he has the capacity to understand the nature and extent of such service, and has the requisite ability to perform it. See *Wood, Law of Master & Servant*, p. 166. In 4 *Thompson on Negligence*, § 4686, it is said: "The rule that an employee assumes the ordi-

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nary risks of the employment applies to minors, as well as to adults, provided the minor has sufficient age, intelligence, and discretion to understand and appreciate the risk to which he is exposed." In the case of *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258, the court says: "A minor employed as a servant assumes to some extent as an adult the ordinary dangers and risks of his employment which he actually knows and appreciates, and those that are so apparent and open that one of his age, experience, and capacity would, in the exercise of ordinary care, know and appreciate."

The use of water and lime in making whitewash, and the effect of water on lime when applied to it, are of such general character and so universally accepted, and are of such commonplace and every day transactions, that any person 19 years of age who had ordinary intelligence and capacity would and ought to know and understand the effect of mixing lime and water, and to take notice of this common and universal natural law, even if the lime was unslacked. In the case of *Roessler & Hasslacher Chemical Co. v. Peterson*, 134 Fed. 789, 67 C. C. A. 295, the court says: "Whitewashing and slacking of lime for that purpose is one of the commonest of domestic service. No special skill or training, and the slightest experience only, are required to perform it. That heat and steam are evolved in the slacking of lime is almost as much a matter of common knowledge as that boiling water will produce steam, and it cannot be seriously contended that any special duty of protection is owing by the employer to a laborer of mature years and intelligence who assumes the work of slacking lime for the purpose of whitewashing. The employer is not to be complained against for assuming that such a man understands as well as the employer all that is necessary to be understood about the work he undertakes. This, we think, is in accord with the well-settled doctrine of the numerous cases dealing with the law of master and servant, and the assumption of risk of employment by the servant." In the case just cited the complaint was that the laborer was put to slacking lime and making whitewash for the purpose of whitewashing, without being properly instructed or warned as to the danger of slacking lime, while the case at bar only alleges that appellant was directed to mix quantities of lime and water in a bucket to make whitewash, without being warned or instructed as to the danger. It therefore follows that, as appellant shows that he had both knowledge and experience, and having both knowledge and experience, however slight, and being a person of 19 years of age, and of ordinary capacity and intelligence, must of necessity be informed of the nature and character of the effect of mixing lime and water in a bucket, and assume the risk incident thereto. See *Ciriack v. Merchants' Woolen Company*, 23 N. E. 830, 151 Mass. 152, 6 L. R. A. 733, 21 Am. St. Rep. 438.

The judgment is affirmed.

LASSING, J., not sitting.

SOUTHERN RY. CO. *v.* MCGOWAN.

(Supreme Court of Alabama, Feb. 5, 1907. On Rehearing, March 2, 1907.)

[43 So. Rep. 378.]

Master and Servant—Injuries to Servant—Action—Questions for Jury.—In an action for personal injuries caused by the breaking of a handle on a hand car, the question was for the jury whether the breaking was due to its insufficiency to perform the service for which it was adapted, or to a latent defect unknown to the master.

Same.—In an action for personal injuries caused by a defective handle on a hand car, where the jury find that the breaking of the handle was due to its insufficiency to perform the service for which it was adapted, it is for them to determine whether the insufficiency of the handle was known to the plaintiff, so that he assumed the risk.

Action—Complaint—Single Cause of Action.—A count in a complaint, which ascribes the injuries of the plaintiff to the negligence of defendant's superintendent in failing to keep the handle of a hand car in proper order and negligently permitting the plaintiff to use it while in a defective condition, was not subject to demurrer on the ground that it set up two separate causes of action.

Master and Servant—Injury to Servant—Complaint.—The count in the complaint was not subject to demurrer on the ground that it failed to show that defendant's superintendent knew, or was negligent in not knowing, of the defective condition of the appliances used, or that it does not show that the alleged defective condition of the appliances used arose from the defendant's negligence.

Same.—Nor was the count in the complaint subject to demurrer on the ground that it did not show that the car was in a defective condition.

Same—Pleading—Contributory Negligence.—In an action for personal injuries to a servant, defendant's plea that plaintiff contributed to the injury by failing to choose a safe place in which to work, but which does not charge that a safe place was apparent or known to him, was bad on demurrer.

Same—Assumption of Risk.*—In an action for injuries to a servant caused by defective machinery, defendant's plea that plaintiff was aware of the defect, that the defect was obvious, and that if plaintiff remained in defendant's service without requesting defendant to repair the same he assumed the risk, was bad on demurrer, because it failed to state that plaintiff knew or appreciated the risks resulting from such defects.

Same—Knowledge of Defects by Master.*—Where a master knows of a defect in his machinery, the servant does not assume the risk

*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by servants, see preceding case, and foot-notes.

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connected therewith by failing to give him notice of the same, although he may not know that the master knew of the defects.

Same—Evidence—Admissibility.—In an action for personal injuries caused by the breaking of a handle on a hand car, the court properly permitted plaintiff to prove that handles of other wood could as easily have been put in, since defendant's failure to get a better one when it was as convenient as the one used was a circumstance for the consideration of the jury.

Same—Rules of Work—Evidence.—Where plaintiff was injured by falling from a hand car while riding backwards, and the existence of a rule forbidding his doing this was disputed, he was properly allowed to show, as proof of the nonexistence of the rule, that others had been riding backwards.

Appeal—Review—Presumptions—Amendment of Pleadings.—Where the bill of exceptions shows that leave was granted to plaintiff to amend his complaint, so as to claim damages for a rupture, it will be presumed on appeal that the amendment was made, to sustain the action of the trial court in admitting evidence on this point, though the record does not show that the pleadings were in fact so amended.

Evidence—Admissibility—Conclusion of Witness.—Where plaintiff was injured by falling from a hand car when riding backwards, the court properly sustained an objection to a question whether or not he would have been injured if he had been standing in a different position, since this was calling for the conclusion of the witness.

Master and Servant—Injuries to Servant—Instructions.—Where plaintiff was injured by falling from a hand car, the court properly instructed that if it was not more dangerous for plaintiff to occupy the position he was occupying when he fell, except by reason of defendant's negligence or a defect in the handle of the car, then the fact that he did occupy that position would not bar a recovery, unless plaintiff knew of the danger.

Same—Duty of Master.—Where plaintiff was injured by falling from a hand car, the court properly charged that whether the defendant was negligent in failing to remedy the defect in the hand car was for the jury.

Same—Assumption of Risk.—A servant assumes only the risks incident to his employment, and is not bound to give notice to the master of defective appliances, where the latter knew of such defects.

Damages—Personal Injuries.—In an action for personal injuries, plaintiff, if entitled to recover, can recover such damages as the jury thought proper under the evidence, not exceeding the amount claimed in the complaint.

Master and Servant—Injuries to Servant—Instructions—Contributory Negligence.†—Where plaintiff was injured while working on a

†For the authorities in this series on the question whether it is contributory negligence in an employee to attempt to do his work by a more dangerous method than the one he might use, see foot-notes appended to *Chicago & A. Ry. Co. v. Walters* (Ill.), 20 R. R. R. 166, 43 Am. & Eng. R. Cas., N. S., 166; foot-notes appended to *Suttle v. Choctaw, O. & G. R. Co.* (C. C. A.), 20 R. R. R. 377, 43 Am. & Eng. R. Cas., N. S., 377.

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hand car, the court properly charged that, if plaintiff could reasonably have used a less dangerous way of working the car, this will not bar his right to recover, unless it appear that he knew he was using a more dangerous way, and that such use was negligent, and that this negligence was the proximate cause of his injuries.

Same—Duties of Master.‡—Where plaintiff was injured while operating defendant's hand car, the court properly instructed that it was the duty of the defendant to use reasonable prudence in selecting a handle for the car, and that plaintiff had the right to assume that the handle furnished was reasonably safe, unless he knew it was not.

Same—Duties of Servant.—Where plaintiff was injured while operating a hand car, the court properly instructed that he was under no duty to examine the handle of the car.

Same—Instructions—In General.—In an action for injuries received while operating a hand car, the court properly charged that if the defective condition of the hand car was due to the negligence of defendant, and defendant negligently omitted to remedy the same, the jury should find for the plaintiff, unless his injuries were contributed to by his own negligence.

Same.—In an action for injuries alleged to have been caused by the defective condition of a handle on a hand car, the court properly refused a charge that plaintiff would be barred from recovery if he knew the kind of wood used and its weakness, whether he knew it was dangerous to use such handle or not.

Same—Instructions.—The court properly refused to instruct that there was no implied warranty on the part of the master that the tools or appliances furnished to a servant were sound and fit for use.

Trial—Instruction—Proximate Cause of Injury.—In an action for injuries alleged to have been caused by a defective handle on a hand car the court properly refused to instruct that the jury could not find that the defect in the handle was the proximate cause of the injury, as invading the province of the jury.

Same—Assumption of Risk.—In an action for injuries alleged to have been caused by the defective condition of the handle on a hand car, the court properly refused to instruct that, if the condition of the

‡For the authorities in this series on the subject of the care required of a master in furnishing appliances, see foot-notes appended to *Moore v. Southern Ry. Co.* (N. Car.), 22 R. R. R. 635, 45 Am. & Eng. R. Cas., N. S., 635; foot-notes appended to *Shandrew v. Chicago, etc., Ry. Co.* (C. C. A.), 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588; foot-notes appended to *McGregor v. Pennsylvania R. Co.* (Pa.), 22 R. R. R. 76, 45 Am. & Eng. R. Cas., N. S., 76; *Vissman v. Southern Ry. Co.* (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361.

For the authorities in this series on the subject of the right of an employee to assume that his master has performed, or will perform, the duties owing to him, see foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 393.

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handle was open to ordinary observation, plaintiff could not recover, since the knowledge of the defect may have failed to apprise the plaintiff that it was dangerous to use the same.

Trial—Instructions—Misleading Instructions.—In an action for injuries from the defective condition of a handle on a hand car, the court properly refused to instruct that defendant was not bound to see that the handle of the car was free from defects, as misleading the jury to conclude that there was no duty upon the defendant to see that the handle was not defective, though its defective condition may have been apparent on examination.

Master and Servant—Injury to Servant—Action—Instructions.—Where injuries were alleged to be due to the defective condition of the handle on a hand car, the court properly refused to instruct that if, from the use of the handle, its defect was not open to ordinary observation, plaintiff could not recover, since this charge pretermitted knowledge by the defendant of a defect in handle.

Same.—Where injuries were claimed to be due to a defective handle on a hand car, the court properly refused to instruct that if plaintiff's injuries were caused by the weakness of the handle, and that such weakness arose from the fact that the handle was made of cedar, then the plaintiff could not recover.

On Rehearing.

Same—Actions—Pleading—Proof.—Where the complaint in an action for injuries claimed to be due to a defective handle on a hand car alleged that the handle of the car was weak and insufficient, that it was made of cedar, that it was split, that it was hollow, and that it was unsafe, the court committed error in charging that the plaintiff could recover, if it was shown that the handle was insufficient and weak, since this charge pretermitted the duty of plaintiff to prove the other defects averred and particularized.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by John H. McGowan against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded on rehearing.

This cause was tried on the amended second count, which is as follows: "Plaintiff claims of the defendant, the Southern Railway Company, a corporation, the sum of \$1,900 as damages for the injury inflicted upon plaintiff, as stated in this complaint, for that, at the time plaintiff was injured, defendant was operating a railroad in this county, and plaintiff at said time was an employee in the service of the defendant in the said business; that plaintiff, in the performance of his duties as such employee, was assisting and propelling a hand car on defendant's railroad on or about the 25th day of February, near Facklers, in Jackson county; that while so engaged the handle of said hand car broke and caused plaintiff to fall in front of said hand car, and that after falling said hand car ran upon him and dragged him some six or eight feet, breaking one of his ribs, and mashing and bruising

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ing and injuring his leg, hip, and thigh, causing him great mental and physical pain and suffering, and also causing him to employ at great expense a physician for the treatment, and to expend large sums of money for medicine, and to lose his time from labor since this occurrence, and by permanently in a measure disabling him from work. And plaintiff avers that the handle of said car was weak and unsafe for service, and plaintiff avers that his injuries were caused by reason of the negligence of Henry Farmer, who was in the service or employment of the defendant, and who had, under his said employment, the superintendence of said car and the use thereof, and also superintendence of plaintiff, and that whilst in the exercise of such superintendence the said Henry Farmer negligently failed to keep the handle of said car in proper order and condition for use in defendant's service, and negligently allowed the use of said car by plaintiff in defendant's service in the said defective condition, to plaintiff's damages aforesaid."

Demurrer was interposed to this count: "Because it joins in one count two separate and distinct causes of action, arising under section 1749 of the Code of 1896 known as the 'Employer's Liability Act.' (2) It does not show that said Henry Farmer knew, or was negligent in not knowing, that said handle of said car was in a defective condition. (3) It does not show that said defective condition arose from, or had not been discovered or remedied owing to, defendant's negligence or the negligence of its agent intrusted with the duty of seeing that the same was in proper condition. (4) Because it does not show that said car was in a defective condition. (5) Because it does not show that said Farmer knew that said car was in a defective condition. (6) Because it does not show wherein said Farmer is negligent."

To this count, after demurrer overruled, the defendant filed pleas C and D, among others, which are as follows: "(C) Plaintiff proximately contributed to the injury and damage complained of by his own negligence, in this: He was holding said lever near the end, and was in front with his back turned in the direction the hand car was going, although there was plenty of room on the inside of the handle, which was a safer place for him to occupy, than that which he did assume, and, had he taken such position, he could not have been injured as alleged. (D) Plaintiff, when said injury occurred, was riding in said car in front of handle, with his back turned in the direction the car was going, and had hold of said handle near the end; whereas, there was a safer position he could have occupied in the discharge of his duties, namely, on the inside of or behind said handle, and fronting the way said car was going, and it was his duty to occupy said last-named position, and by his failure to do so he approximately contributed to the damage and injuries complained of."

Demurrers were interposed to C as follows: "(1) It does not show that plaintiff knew of the safer place. (2) It does not show that plaintiff was negligent in occupying the position al-

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leged in said plea, and holding the handle as alleged." And to plea D: "It does not show that plaintiff knew of said alleged safer position, and it fails to show any negligence on the part of the plaintiff."

Plaintiff filed pleas 4, F, and G, as follows: Plea 4: "Plaintiff, after becoming aware of the existence of said defect, remained in defendant's service without notifying defendant thereof or requesting defendant to repair the same." Plea F: "Plaintiff had been working on said hand car for about two months, and knew the condition of said handle, and with such knowledge continued to use such handle without objection or request that the same be repaired." Plea G: "The condition of said handle is obvious, and, if it was in a defective condition, plaintiff assumed the risk attendant upon its use by him."

Demurrers were interposed to these pleas as follows: To plea 4: "For that said plea fails to show that plaintiff's act in remaining in defendant's service as alleged was a negligent act. (2) Said plea fails to show any act of negligence by plaintiff. (3) For aught that appears from said plea, defendant knew of said defects." To plea F: "(1) It does not show there was any obvious danger in using the handle. (2) It does not show that plaintiff knew of any danger in using said handle. (3) It does not show any act of negligence on plaintiff's part in using said handle." To plea G: "Because it does not show that plaintiff acted negligently in using said handle. (2) It does not show that plaintiff had knowledge of any danger in using said handle. (3) It is not alleged that there was obvious danger."

The plaintiff filed a replication to plea 3 as follows: "That the defendant already knew of said defects." Demurrers were interposed to this replication: "For that it does not appear therefrom that plaintiff was aware that defendant knew of said defects; and for that it is a departure from the first count of the complaint." These demurrers being overruled, the defendant rejoined, and said that plaintiff remained in the service or employment of defendant for an unreasonable time after he became aware that defendant knew of said defect and after defendant had failed to repair the same. Demurrers were interposed to rejoinder as follows: "For aught shown by the rejoinder, the plaintiff continued in defendant's service at defendant's instance. Said rejoinder is irrelevant to any issue raised as to any matter previously pleaded. The fact, if it be a fact, that plaintiff remained in the service of defendant, is no answer to discharge defendant of negligence."

The facts are sufficiently stated in the opinion.

In his oral charge to the jury the court said: "If it was not more dangerous for plaintiff to occupy the position he was occupying when he fell, except by reason of defendant's negligence or a defect in the handle of the car, then the fact that he did occupy that position would not bar a recovery, unless you should find that the plaintiff knew the position he was occupying when he fell was more dangerous than the one he left.

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Whether the defendant was negligent, as is charged in the complaint, or whether there was a defect in the handle, or whether such defect or negligence made the position occupied by the plaintiff when he was hurt more dangerous, you must determine from the evidence." And: "The employee, or the plaintiff in this case, would assume ordinarily the risk only of such dangers as are incident to his employment." And: "If the section foreman knew of the defect, if there was a defect, and if the plaintiff also knew of it, he was not bound to give any notice of it." And: "It is not necessary for plaintiff to prove that the hollow or split in the handle was the cause of the injury. It is simply necessary to show that the handle was an unsafe timber to operate the car with; that is, you must be reasonably satisfied from the evidence that it was unsafe for the service." And: "It is not necessary to a recovery under the first count to prove that all the defects named therein caused the injury." And: "If you find that plaintiff is entitled to recover, then he is entitled to recover such an amount as under the evidence, you think proper—such an amount as you in your discretion see fit—not exceeding the amount claimed in the complaint." And in this connection the court said that, if plaintiff was entitled to recover, he should have reasonable compensation for pain and suffering and loss of time and physical injury sustained by him, caused by defendant's negligence, and that the amount of damages lay in the discretion of the jury, which should not be more than fair and reasonable compensation for plaintiff's sufferings and injuries. Exceptions were reserved to all these portions of the court's oral charge.

At plaintiff's request the court gave the following written charges: "(1) The court charges the jury that, if it appears from the evidence that plaintiff could reasonably have used a less dangerous way to work the handle of the lever of the car, this will not of itself bar his recovery. It must further reasonably appear from the evidence that the plaintiff knew he was using a more dangerous way, that such use of a more dangerous way was negligence, and that this negligence was the proximate cause of his injuries. (2) The court charges the jury that it was the duty of the defendant to be reasonably prudent and cautious in selecting a handle for the lever of the car, and that when the handle was put in the lever, if the plaintiff then and thereafter used it in his duties under his employment, then plaintiff, in using the handle, had the right to assume it was reasonably safe for service, unless he knew it was not so. (3) The court charges the jury that the plaintiff was under no duty to examine the handle to see if it was all right; but he had the right in law to assume it was fit for service, and could act upon this assumption in using it, unless he knew it was not safe for service. (4) The court charges the jury that if they are reasonably satisfied from the evidence that the plaintiff's injuries were caused by reason of the defective condition of the handle of the lever of the car, in that said handle was weak and insufficient for the service, and that

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it was made of cedar, and if the jury are further reasonably satisfied from the evidence that this defective condition had not been remedied, owing to the negligence of the defendant, and that defendant knew of such defect, in a time reasonably sufficient to remedy the same, then they must find for the plaintiff, unless the evidence reasonably shows to the jury that the plaintiff's injuries were the result of his negligence and that his negligence proximately contributed to his injuries." The defendant requested the court in writing to give the following charges, which were refused: Charges 1, 2, and 3 were the affirmative charges as to the various counts of the complaint. Other charges: "(4) If you believe from the evidence that the handle was weak, and that its weakness is due to the fact that it was made of cedar, and that the plaintiff, several months before the injury, knew that it was made of cedar, and continued to work with it up to the time of the injury without making any objections to using it, he cannot recover in this case. (5) There is no implied warranty on the part of the master or employer that the tools and appliances furnished his servant are sound and fit for the purpose intended. (6) You cannot find from the evidence in this case that the hollow and split in the piece of handle offered in evidence was the proximate cause of the injury. (7) If the condition of the handle was open to ordinary observation, plaintiff cannot recover in this case; nor can he recover, if its condition was not open to ordinary observation, unless its defective condition was known to defendant or Farmer, or could have been discovered by them by the use of reasonable and ordinary care, and they failed to use such care. (8) Although plaintiff is not bound or required to inspect or examine the handle, yet if the fact that it was made of cedar and that it was hollow or split was open to ordinary observation, plaintiff assumed the risk of any injury caused thereby. (9) The defendant was not bound to see the handle of said car was free from defect or the best in use, and is not chargeable as an insurer of its safety. (10) If you believe from the evidence that the danger, if any, from the use of the handle, was not open to ordinary observation and could not be discovered by Farmer any more readily than by plaintiff, plaintiff cannot recover therefor. (11) If you believe from the evidence that plaintiff's injuries were caused by reason of the weakness of the handle, and that such weakness arose solely from the fact that the handle was made of cedar, then the plaintiff cannot recover. (12) There is no evidence in this case that the split and hollow in the piece of handle produced before the jury was the proximate cause of the injury."

It is unnecessary to set out the other charges.

Humes & Speake, for appellant.

Bilbro & Moody, for appellee.

ANDERSON, J. It appears from the evidence that the plaintiff's fall and injuries were the result of the breaking of a cedar lever used by him and others in propelling a hand car upon

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which they were riding while in the discharge of their duty to the defendant. It also seems to be a question of fact as to whether there was or was not a latent defect in the lever which caused it to break. If the breaking of the lever was due to a hidden defect not known to the master, or which had not been discovered by the use of ordinary diligence, then the master would not be liable for injuries resulting therefrom. On the other hand, if the lever broke because of its general insufficiency to perform the functions for which it was used, it was for the jury to determine whether or not the master was negligent in furnishing such a handle, and the plaintiff had a right to expect that one would be furnished which could be used with safety, and would not be charged with an assumed risk unless its insufficiency was known to him. It is the duty of the master to furnish the servant reasonably safe appliances. The servant may assume that the appliances furnished are free from defect. He is not required to exercise ordinary care to ascertain the defect. *L. & N. R. R. Co. v. Hawkins*, 92 Ala. 241, 9 South. 271.

Mr. Bailey, in his work on Master's Liability for injuries to Servant (page 2), repeats the long-established rule as to the implied obligation of the master "that he shall provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit. * * * In the performance of these duties, the master is bound to the exercise of reasonable and ordinary care, and such only." The authorities are all agreed that the degree required to be exercised is that of ordinary care; yet as to what measure of diligence will constitute ordinary care in its relation to particular facts and circumstances, and what comparisons and tests may be, or ought to be, applied as a basis for determining whether the act or omission was the exercise of such degree of care, there is apparent conflict. It was very truly said by the federal Supreme Court in a recent case: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct should constitute ordinary care under any and all circumstances." The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the affairs and conduct of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs. It was, therefore, a question for the jury to determine whether the breaking of the lever was due to its insufficiency to perform the service for which it was adopted, or to a latent defect unknown to the master; and, if to the former, it was also within the province of the jury to determine whether the insufficiency of the

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lever was known to the plaintiff and he had therefore assumed the risk. It must, therefore, be observed that the affirmative charge was properly refused.

The second count, as amended, was not subject to the demurrer interposed. It was framed under the second subdivision of the employer's liability act, and ascribes the injuries of the plaintiff to the negligence of one Farmer, who had superintendence intrusted to him, in that he failed to keep the handle of the car in proper order and permitted the plaintiff to use it while in a defective condition. The gravamen of the count is the negligence of Farmer and his failure to keep the car in order, and his permitting the plaintiff to use it is a conjunctive averment, and the count does not attempt to set up two separate and distinct causations, nor does it come within the influence of the cases of *R. & D. R. R. Co. v. Weems*, 97 Ala. 270, 12 South. 186, and *H., A. & B. R. R. v. Dusenberry*, 94 Ala. 413, 10 South. 274. Nor was the second count subject to any of the grounds of demurrer assigned; but we do not wish to be understood as holding that it is a perfect count.

If there are two ways of discharging the service, apparent to the employee, one dangerous and the other safe, or less dangerous, he must elect the safe or less dangerous way, and cannot recover for an injury sustained when the danger is imminent and so obvious that a prudent man would not incur the risk under similar circumstances. *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700; *L. & N. R. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *M. & O. R. R. v. George*, 94 Ala. 200, 10 South. 145. Pleas C and D do not charge that a safe way was apparent to or known to plaintiff, and were subject to the demurrer interposed, which was properly sustained.

In order for the plaintiff to be charged with the assumption of risk, it is not sufficient that the defect be obvious; but it must convey to a mind like his the danger that may or is likely to result from the defect. It is important here to note a distinction well elucidated in the cases of *Russell v. M. & St. L. R. R.*, 32 Minn. 230, 20 N. W. 147, and *Cook v. St. P. R. R.*, 34 Minn. 45, 24 N. W. 312, viz.: "It is one thing to be aware of defects in the instrumentalities or plant furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defects. The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risk growing out of them." The question is: Did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed? See, also, *Bailey's Master's Liability for Personal Injuries*, 184. The demurrers to pleas 4, F, and G were properly sustained.

In the case of *L. & N. R. R. Co. v. Stutts*, 105 Ala. 368, 17 South. 29, 53 Am. St. Rep. 127, there is an expression by the writer on page 376 of 105 Ala., page 29 of 17 South. (53 Am.

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St. Rep. 127), which is misleading and rather commits the court to the doctrine of assumption of risk based upon a mere knowledge of the defect, regardless of a knowledge of the dangerous consequences; but the writer further on quotes, and therein appears the additional fact that the servant must have acquired notice of "an incurred risk of danger." Again the writer says: "The only defects brought to light and complained of were patent, and understood by the engineer as well as by the company," etc. If they were patent and understood by the engineer, then he, of course, not only knew of the defects, but knew that their existence increased his risk or danger, and the opinion is really in line with what we hold in the case at bar. *Birmingham Railway & Electric Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457; *Eureka Company v. Bass*, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152. .

The trial court properly overruled the demurrer to the replication to the third plea, and properly sustained the one to the rejoinder. It was not necessary for the plaintiff to notify the defendant of the defect, if the defendant already knew the same. The law does not require the doing of a useless thing. The case of *Thomas v. Bellamy*, 126 Ala. 253, 28 South. 707, merely repeats the statute, which relieves the servant of giving notice if he is aware the master knew of the defect; but we do not think that the statute means that the servant is required to give the notice, whether the master was aware of it or not, unless he knew the master knew it. If the master of it, then the servant is relieved of giving the notice, although he may not know that the master knew of the defect. *Birmingham Railway & Electric Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457.

The trial court did not err in permitting plaintiff to prove that there were other timbers where Farmer put in the cedar stick. It was for the jury to determine if the other timbers were stronger and better, and if a failure to get a stronger and better one did not tend to show negligence in furnishing ways, works, etc. It is true that the use of the other timbers would not relieve the master if they were insufficient nor was it required to get other timbers if the one used was sufficient; but the failure to get a better one, which was as convenient as the one that was gotten, was a circumstance for the jury.

There was no error in permitting the plaintiff to show that others had been riding backward. While a custom to violate a rule does not make the violation less negligent, yet the existence and promulgation of the rule forbidding the hands from riding backward was disputed, and the fact that they frequently rode backward in the presence of Farmer was a circumstance for the consideration of the jury in determining whether or not such a rule existed.

The plaintiff had the right to show that he was ruptured by the fall, and to exhibit himself to the jury, if the trial court saw fit to permit him to do so. It is true that the complaint did not

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claim damages for a rupture, and the record discloses no amendment to cover this claim; but the bill of exceptions recites that leave was asked and granted to amend in this respect, and we will presume, from these recitals, that the complaint was amended so as to meet this evidence, in order to sustain the ruling of the lower court. *Lesne's Case*, 3 Ala. 741; *Bettis' Case*, 28 Ala. 214; 2 Am. & Eng. Ency. Pl. & Pr. 468; 1 Am. & Eng. Ency. Pl. & Pr. 581, 582.

The trial court properly sustained the objection as to "whether or not McGowan would have been hurt if he had been standing behind the lever." It called for the mere conclusion of the witness. It was for the jury to determine from the evidence whether or not his position on the car was the cause of his injury.

There was no error in the oral charge as excepted to by the defendant.

There was no error in giving charges 1, 2, 3, and 4, requested by the plaintiff.

Charges 1, 2, and 3, requested by the defendant, were the affirmative charges, and have been fully discussed in this opinion. They were properly refused.

Charge 4, requested by the defendant, was properly refused. If not otherwise bad, it seeks to charge the plaintiff with a mere knowledge of the kind of wood and its weakness, whether he knew that it was dangerous to use such a handle or not.

Charge 5, requested by the defendant, was properly refused. It was abstract. The injury was not the result of tools furnished, but was the result of a defect in the ways, works, etc.

Charge 6, requested by the defendant, was properly refused. It invaded the province of the jury.

Charge 7, requested by the defendant, was properly refused. If not otherwise bad, it seeks to relieve the defendant if the condition of the handle was open to ordinary observation, yet the defect may not have been so open to observation as to apprise the plaintiff that it was dangerous or risky to use the same.

Charge 8, refused to the defendant, if not otherwise bad, ignores the fact as to whether the split or hollow, if open to ordinary observation, was of such character to put plaintiff on notice that it was dangerous or risky to use the same.

Charge 9, requested by the defendant, was properly refused. It was calculated to mislead the jury to conclude that there was no duty upon the defendant to see that the handle was not defective, notwithstanding its defective condition may have been such, upon examination, that it would be dangerous to use it.

Charge 10, requested by the defendant, was properly refused. If not otherwise bad, it pretermits a knowledge of the defendant of a defect in the handle.

There was no error in refusing the other charges requested by the defendant.

After a careful consideration of the evidence, we are not will-

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ing to reverse the action of the trial court in overruling the motion for a new trial.

The judgment of the circuit court is affirmed.

Tyson, C. J., and DODWELL and McCLELLAN, JJ., concur.

On Rehearing.

ANDERSON, J. Upon a reconsideration of this case, while not receding from the general principles enunciated in the original opinion as applied to the questions as presented, and without indorsing the correctness of the pleading throughout the case, which we treated as presented, and upon the grounds of demurrer as assigned, we are of the opinion that the case should be reversed for the giving of charge No. 4, requested by the plaintiff. When the complaint specifies the defects, it becomes matter of description, which it is incumbent on plaintiff to prove with equal particularity, as also that he was injured by reason of said defect. If, therefore, the evidence fails to satisfy the jury that the particular defect existed, or that plaintiff was injured by reason thereof, he would not be entitled to recover. *Mobile & Ohio R. R. v. George*, 94 Ala. 219, 10 South. 145; *L. & N. R. R. Co. v. Coulton*, 86 Ala. 129, 5 South. 458. The complaint in the case at bar avers that the defects were that "the handle of the car was weak and insufficient for the service for which it was used, that it was made of cedar, that it was split, that it was hollow, and that it was unsafe for use." Charge 4 predicated a finding for the plaintiff if the handle was insufficient and weak because made of cedar, and pretermitted the duty of plaintiff to prove the other defects averred and particularized.

The application for rehearing is granted, and the judgment of affirmance is set aside, and the judgment of the circuit court is reversed, and the cause remanded.

NORTHERN ALABAMA RY. CO. v. KEY.

(Supreme Court of Alabama, Feb. 14, 1907. Rehearing Denied May 6, 1907.)

[43 So. Rep. 794.]

Master and Servant—Rules—Protection of Employees.—A railway company made a rule that its hostlers, whose duty it was to take charge of its engines when they came in off the road, should, before backing the locomotive, blow the whistle or ring the bell. Held, that the rule was for the protection of the railway's employees, as well as others.

Same—Duty to Promulgate.*—In an action for injury to plaintiff's

*See foot-notes appended to *Morrison v. San Pedro, etc., R. Co.* (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690; foot-notes appended to *Louisville & N. R. Co. v. Vincent* (Tenn.), 22 R. R. R. 415, 45 Am. & Eng. R. Cas., N. S., 415.

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intestate, by being run over by a locomotive operated by a servant of defendant, who failed to ring the bell or blow the whistle before moving the same, as required by defendant's rules, defendant cannot escape liability on the ground that the servant did not know of the rule, since it was its duty to inform him of it.

Same—Contributory Negligence—Precautions against Known Dangers.†—It was not contributory negligence for an employee to go upon the track, when he knew a locomotive was to be backed, since it was his duty to go there to place the lights, and he had a right to presume that it would not be moved until the signal required by the rules of the company had been given.

Same—Disobedience of Rules or Orders.—Where plaintiff's intestate was killed by being run over by a backing locomotive, when he went upon the track to fix the lights, he was not guilty of contributory negligence in failing to signal the hostler in charge of the locomotive to stop, where it was already standing still.

Evidence—Secondary Evidence.—In an action for personal injuries due to the negligence of a railway company's employee, where the fact that the company had certain rules for the conduct of employees, which were not brought out in the pleading, but developed incidentally in the examination of a witness, when there was no opportunity for demanding a printed copy, which was in the hands of the defendant, the plaintiff may show the contents of the rules by the testimony of the witness.

Death—Damages—Instructions.—In an action for the death of plaintiff's intestate, it was not error for the court, in instructing the jury as to the measure of damages, to state that the mortality tables placed the life expectancy of plaintiff's intestate at so many years, where he further informed them that this was not conclusive.

Master and Servant—Injuries to Servant—Negligence of Master.—Where a servant of a railway, having charge of a locomotive, backed it over plaintiff's intestate, causing his death, his negligence did not depend alone on whether he knew that the intestate was in a perilous position; but he was chargeable with negligence if he knew that the intestate's duties required him to place the lights, when it was determined to back the engine, and that he was, therefore, liable to be in a place of danger.

Appeal from Circuit Court, Colbert County; Ed. B. Almon, Judge.

Action by John W. Key, administrator, against the Northern Alabama Railway Company. Judgment for plaintiff and defendant appeals. Affirmed.

This was an action for damages for death of an employee. The facts are sufficiently stated in the opinion. In his oral charge to the jury, the court said: "In assessing damages in a case like this, it devolves on the jury, upon consideration of all the circumstances bearing upon the subject, as disclosed by the evidence, to ascertain what the duration of the party's natural life would

†See preceding case, and foot-notes.

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have been. There is no ascertaining it as a positive fact. The period fixed in any case is necessarily an inference drawn from many conditions and circumstances. In the same case different minds of equal intelligence might reach different conclusions. The tables of mortality, computed upon the experience of life insurance companies, which, being of such universal recognition, courts will judicially notice, place the life expectancy of plaintiff's intestate at 40 years, if you find from the evidence that he was 21 years old at the time of his death; but this is not conclusive." The defendant requested the following charges, which were refused: Charge 6: "Whether Hanlan, the hostler, was guilty of negligence, depends on whether, when he began to back the engine, he knew that Key was in such a position as made him liable to be struck by the engine; and if the hostler began to back without knowing where Key was, and without having rung the bell or blown the whistle, plaintiff is not entitled to recover." Charge 7: "If the defendant had a rule requiring the bell to be rung or the whistle to be blown before the hostler began to back the engine, the violation of such rule would not be negligence, for which an employee or employee's administrator could recover." There was verdict and judgment for the plaintiff in the sum of \$2,000, and defendant appeals.

Humes & Speake, for appellant.

Kirk, Carmichael & Rather, for appellee.

SIMPSON, J. This was an action for damages for the death of plaintiff's (appellee's) intestate, who was an employee of the defendant (appellant). Said intestate was employed as a herder, and a locomotive of defendant's was in charge of one Hanlan, who was a hostler, and whose duties, according to the evidence, were to take charge of the engine when it comes in off the road, to take it to the shop, or bring it back; and it was also his duty, before backing his engine, to blow the whistle or ring the bell. The evidence shows that, at the time the accident occurred, the engine was backing, and that the hostler did not ring the bell or blow the whistle when he backed it.

Appellant urges that the general affirmative charge should have been given in favor of the defendant, and his first insistence is that the only negligence chargeable to the hostler is that he failed to ring the bell or blow the whistle when the engine was backed, and that the rule requiring this duty was not for the benefit of employees of the company, but only for the public who might be crossing the track; and in substantiation of that position the case of *Central of Ga. Ry. Co. v. Martin*, 138 Ala. 531, 544, 36 South. 426, is cited. That was a case where there was a collision of the train of one railway with the train of another, and the court held that the provisions of law with regard to signals and precautions at public road crossings, and on entering and passing through towns, etc., did not apply, for the very sufficient reason that another class of rules are provided for the purpose of preventing collisions, which are as liable to

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occur at any other place as at a public road crossing. The case of *K. C., F. S. & M. Ry. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723, is equally inapplicable to the facts of this case. In that case it was merely held that the railroad company was not bound to make a rule requiring engineers, on approaching a quarry, to sound the whistle. The workmen at a quarry have no more right than any one else to be upon the tracks of a railroad, and if, by reason of the operation of their quarry, obstructions were thrown on the track, it would be their duty, without any rule, to put out signals to warn the approaching train. We can see no reason why the rule in question was not as much for the protection of the employees as for any one else who should happen to be on the track. In fact, it would seem that common prudence would dictate such a precaution, where an employee's duties were such as to be likely to require him to be on the track.

It is next insisted, that if this rule was intended for the protection of the employee, yet the company could not be made liable, because there was no evidence that the hostler knew of this rule; and the Case of *Graham*, 94 Ala. 545, 10 South. 283, and *Hawkins' Case*, 92 Ala. 245, 9 South. 271, are cited. In those cases it was held that an employee could not be held guilty of contributory negligence for the violation of a rule of which he had no knowledge. It will be readily seen that the cause is very different where the principal is sued for injury resulting from the failure of his employee to observe the reasonable precautions which he has laid down for guidance of his employees, in order to protect others from injury. The duty rests upon the principal to adopt reasonable rules in the conduct of its business for the protection of its employees who are placed in danger, and to instruct its employees in regard to said rules; and while it is true that such rules do not stand like statutory requirements, so that the violation of them would be necessarily negligent, yet where they are reasonable, as in this case, and such as it would be the duty of the principal to adopt and enforce, the presumption, as against the principal, is that its employee has been informed of the rule, and the principal cannot shield itself from responsibility, by alleging its failure to instruct its own employee. 1 *Labatt's Master & Servant*, p. 31 § 16a; *Id.* p. 443, § 207; *Id.* § 109, and notes, p. 489, § 218; *Id.* p. 493, § 219, and notes, p. 494; *Luebke v. Chicago, M., etc., Ry.*, 17 N. W. 870, 59 Wis. 127, 48 Am. Rep. 483; *Promer v. Milwaukee, etc., Ry.*, 63 N. W. 90, 90 Wis. 215, 48 Am. St. Rep. 905; *Smithson v. Chicago G. W. Ry.*, 73 N. W. 853, 71 Minn. 216; *Daley v. Brown* (N. Y.) 60 N. E. 752. While it may be that the evidence does not show that the hostler knew the intestate was in the place of danger, yet it does not show that it was the duty of said intestate to place the lights, and he therefore had knowledge of the fact that intestate's duties called him to that place.

It is next insisted that the deceased was guilty of contributory negligence: (1) Because he knew that the engine was to be moved backward. That may be true, but that very knowledge suggested to him his duty to place the lights before it was moved

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backward, and he had a right to presume that it would not be moved back until after the signal had been given. (2) Because of the evidence with regard to the duty imposed upon the deceased to give a signal and have the engine stop before he attempted to go behind it and place the lights. The evidence upon this subject is that "it is the duty of the herder, if he wishes to fix the lights on the engine backing towards him, or if he wishes to get on the track, to signal the hostler to stop the engine before he goes in," and "it is his duty, if he wishes to fix the lights, after the engine begins to move, or if he has to get on the track for any purpose ahead of the engine, to signal the engineer to stop before doing so." It will be noticed that this duty to signal was only for the purpose of stopping the engine after it had started; for there would be no sense in giving a signal to stop the engine when it was stationary. There is not any evidence to show that the deceased went in to place the lights after the engine started. On the contrary, one of the witnesses testified that he was in the act of performing that duty when the engine was backed. The evidence does not show that he was guilty of contributory negligence.

It is next insisted that the court erred in permitting the witness to testify as to the contents of the rules prescribing the duties of the hostler as it was shown that such rules were written or printed. While our court has laid down the principle that, when the defendant seeks to prove by parol the contents of its own rules, which were printed, it could not be done (*Ga. Pac. Ry. v. Propst*, 90 Ala. 1, 7 South. 635; *L. & N. R. R. Co. v. Orr*, 94 Ala. 602, 10 South. 167), yet where the fact of there being such a rule is not brought out in the pleading, and the matter is developed incidentally in the examination of a witness, when there is no time nor opportunity for demanding the printed copy, which is in the hands of the defendant, we think it would be unjust to deprive the plaintiff of the benefit of the testimony as to what are the duties of the hostler. It is within the power of the defendant to produce the book and show what the rules are. The company cannot prevent the plaintiff from proving what the duties of its servants are (which is a matter known to all of its employees) by showing that the duties are stated in a printed rule.

There is some confusion in the next contention of appellant's brief, as it refers to assignments 8 and 9, and his argument relates to assignments 6 and 7. There is no error in the matter referred to in said assignments relating to the charge of the court on the measure of damages. The court did not, as in the *Jones Case*, 114 Ala. 520, 533, 21 South. 507, 62 Am. St. Rep. 121, undertake to state that the expectancy of the deceased was a certain number of years, but only that the tables place the life expectancy at so many years, and the charge went on to inform the jury that "this is not conclusive."

Charge 6, requested by the defendant, was properly refused. As we have before shown, the question as to whether Hanlan

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was guilty of negligence did not depend alone on whether he knew that the deceased was in a perilous position; but he would be chargeable with negligence if he knew that the deceased's duties required him to place the lights, when it was determined to back the engine, and that he was, therefore, liable to be in the perilous position at that time.

Charge 7, requested by the defendant, was properly refused. As has been before shown, while it is true that the mere fact that there was a rule requiring the hostler to blow the whistle or ring the bell would not necessarily render the hostler's act in disregarding it negligence, yet when that rule was reasonable, and such as it was the duty of the defendant to adopt, the disregard of it would be negligence.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

VITO v. WEST CHESTER, KENNETT & WILMINGTON ELECTRIC Ry. Co.

(Supreme Court of Pennsylvania, April 1, 1907.)

[66 Atl. Rep. 659.]

Master and Servant—Injury to Servant—Negligence of Fellow Servant.*—Where a workman excavating the roadbed of a railway was injured by the explosion of dynamite caused by the negligence of a co-employee who was helping plaintiff in lighting the fuses, he cannot recover from the railway company employing him.

Appeal from Court of Common Pleas, Chester County.

Action by Felice Vito against the West Chester, Kennett & Wilmington Electric Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

At the trial it appeared that at the time of the accident the plaintiff was engaged in excavating the roadbed of defendants' railway. While so engaged, he was injured by an explosion of dynamite. The testimony showed that the accident was caused by the negligent act of one Big Mike in prematurely lighting a short fuse. The court entered a nonsuit, saying: "I cannot see that there is any liability here on the part of the defendant for this accident in any way. If anybody was responsible for it other than the plaintiff himself, it was Big Mike, who was not a vice principal, nor a principal. At most, he was foreman, or 'boss,' as he was called, but in this accident he was a co-

*For the authorities in this series on the question whether a foreman is the fellow servant of a hand working under his orders, see foot-notes appended to *Chicago & E. R. Co. v. Kimmel* (Ill.), 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to *Jemming v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 697, 42 Am. & Eng. R. Cas., N. S., 697.

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employee at the time the accident happened, for which the company would not be liable. We therefore direct a nonsuit."

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and STEWART, JJ.

W. S. Harris, for appellant.

PER CURIAM. Judgment affirmed on the opinion of the learned judge below on entering the nonsuit.

SOUTHERN RY. CO. v. SHOOK

(Supreme Court of Alabama, April 11, 1907.)

[43 So. Rep. 579.]

Master and Servant—Employer's Liability Act—Defect in Ways.*

—The placing by a railway company of a box car on a side track to be used as a baggage room, so close to the main track that there was insufficient space for an employee to transfer baggage between such car and trains on the main track, was at most an obstruction, and in no sense a defect in the ways, works, etc., within Employer's Liability Act, Code 1896, § 1749, subd. 1.

Same.—Under Employer's Liability Act, Code 1896, § 1749, subd. 2, making employers liable for injury to servants negligently caused by any person in the master's service, having superintendence, control, etc., a complaint charging that a railway employee's death resulted from the negligence of a person whose name was unknown to plaintiff, in the service of the company, who had control and management of the train the movement of which caused the death, and had authority to direct the train to be started, and that such person while exercising such superintendence negligently caused the train to be put in motion, was not demurrable.

Same—Safe Place to Work.—In an action against a railway company for the death of an employee, caused by the movement of a train while he was between it and a box car on a side track, where he was engaged in transferring baggage, a count of the complaint charging the company's failure to provide him with a safe place to work was demurrable; there being nothing in the complaint indicating the death was due to any other cause than the moving of the train.

Same.—In an action against a railway company for the death of an employee, caused by the movement of a train while he was between it and a box car on a side track, plaintiff failed to make out a case under Employer's Liability Act, Code 1896, § 1749, subd. 2, making employers liable for injury to servants negligently caused by

*For the authorities in this series on the subject of the application of employer's liability acts, see foot-notes appended to *Pittsburg, etc., Ry. Co. v. Lichteiser* (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130; foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 572, 44 Am. & Eng. R. Cas., N. S., 572.

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any person in the master's service having superintending control, etc., where the train was started in response to signal given by a baggage-master, as to whom there was no proof that he had superintendence or control of the train, nor facts from which it could be inferred.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by B. F. Shook, administrator, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action by an employee of the defendant, or rather by the administrator of an employee, and the cause of the death was by reason of a defect in the condition of the ways, works, machinery, or plant connected with or used by the defendant in its business. The defect is alleged to be that the baggage room used by defendant at said place was a box car on a side track by the main line on which defendant's said passenger train was run, and that said box car was so near said main line that, when the baggage car of the train was opposite thereto, there was insufficient space for plaintiff's intestate to handle the baggage from the said box car to said baggage car of the train after said train was put in motion as herein averred, and that the defect arose from and had not been discovered, etc. The second count avers the death of the intestate by reason of the negligence of a person whose name is unknown to plaintiff, in the service of the defendant, who had control and management of said train, and had the authority to direct the said train to be started after its stop, and that this superintendence was intrusted to said person by the defendant, and that said person, while in the exercise of such superintendence, negligently caused said train to be put in motion. A great many demurrers were interposed to both of these counts, which are unnecessary to be here set out. The other facts sufficiently appear in the opinion of the court. There was judgment for plaintiff in the sum of \$1,990, and defendant appeals.

Humes & Speake, for appellant.

Bilbro & Moody, for appellee.

ANDERSON, J. The first count of the complaint attempts to set out a cause of action under subdivision 1 of the "Employer's Liability Act" (section 1749 of the Code of 1896), which provides against a defect in the ways, works, machinery, etc., but in attempting to describe the defect it fails to show that there was any defect, or that the intestate's death was the result of a defect, if one existed. The placing or leaving of the box car on the side track was at most an obstruction, and in no sense constituted a defect in the ways, works, etc. *L. & N. R. R. v. Bouldin*, 110 Ala. 185, 20 South. 325; *K. C. M. & B. R. R. v. Burton*, 97 Ala. 240; 12 South. 88; *B., F. & M. R. R. v. Gross*, 97 Ala. 220, 12 South. 36. The trial court erred in not sustaining the demurrer to this count.

The second count of the complaint was framed under the sec-

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ond subdivision of the statute, and was not subject to the demurrers interposed.

The fifth count of the complaint charges a failure to provide the plaintiff's intestate with a safe place in which to discharge his duty, but shows that his death was not the result of said failure. It avers that death resulted from the starting of the train while the intestate was between it and the box car, and the demurrer to this count should have been sustained. There is nothing in the complaint indicating that the intestate's death was the result of an unsafe place, or was due to any cause other than the moving of the train. The place was safe as long as the train was stationary, and the intestate would not have been killed if the train had not started while he was in a certain position.

Since this case must be reversed, we deem it necessary to discuss the questions involved only so far as they relate to the good count. The second count avers that the train was started by a person in control thereof and who had the superintendence of same. The undisputed evidence shows that the train was started forward, after it had been backed, in response to a signal given by Sam Davis, the baggagemaster, and there was no proof that he had the superintendence or control of the train, and no facts from which it could be so inferred. Therefore the plaintiff failed to prove his count, or to make out a case under the second subdivision of the statute. It is true the engineer or fireman may have actually started the train, but there is no proof that they knew of the intestate's position at the time they did so; and, as they acted entirely upon the signal of Davis, they did not negligently start the train. As to whether or not the facts bring the case within the fifth subdivision, and whether or not Davis signaled the starting of the train upon the orders of the intestate, we need not decide, as that question is not before us. It is sufficient to say that the proof did not support the present complaint.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL, and McCLELLAN, JJ., concur.

OWENS v. SAN PEDRO, L. A. & S. L. R. Co.

(Supreme Court of Utah, April 8, 1907.)

[89 Pac. Rep. 825.]

Master and Servant—Fellow Servants—Foreman of Construction Crew.*—Defendant railroad company had a superintendent of bridges,

*For the authorities in this series on the question whether a foreman is the fellow servant of a hand working under him, see foot-notes appended to *Chicago, etc., R. Co. v. Kimmel* (Ill.), 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to *Jemming v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 697, 42 Am. & Eng. R. Cas., N. S., 697.

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who had general supervision and control of the bridge work on defendant's line and the various crews of men engaged therein. One of these crews, of which plaintiff was a member, consisted of four men, with whom was also a foreman, who directed where they should work and what they should do. A push car without brake was used by the crew, and on the morning of the accident the foreman directed a scantling to be put on the car to be used as a brake, and in going down a grade directed one of the crew to so use the scantling, and in doing so it was jerked from his hand, and, striking the ground in front of the car, derailed it, thereby throwing plaintiff to the ground and injuring him. Held, that the foreman was a fellow servant of plaintiff as to the occurrences which gave rise to plaintiff's injury.

Trial—Direction of Verdict—Specification of Reasons.—The trial court in directing a verdict is not required to specify its reasons for the direction.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Frank Owens against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The appellant, as plaintiff, brought this action for personal injuries received while in the employ of the respondent as a carpenter working on bridges. The case was tried to a jury, and at the close of the evidence the court, on motion, directed a verdict for the defendant. The plaintiff appeals.

The defendant company had a superintendent of bridges by the name of Young, who had general supervision and control of the bridge work on the defendant's line of railroad and of the various gangs of men engaged therein. George Barrett was foreman of one of these gangs, consisting of four men besides himself. Young gave Barrett general directions regarding the work, but was not often present with this crew. Barrett had control of them in the conduct of their work—directed where they should work, and what they should do. The plaintiff was employed by the company at Salt Lake City and sent to Modena, Utah, where he reported to Barrett. After working at Modena for about a month, the crew moved to Islen, Nev., in December, 1903. They had been using in their work a push car which had no brake. It was generally loaded with lumber and pushed by the men from the camp to the bridge where they were at work. Sometimes the car would run by gravity, when they would ride on it short distances. On the morning of the accident, in loading the push car with lumber, across each end was placed, as usual, a long 2 by 4, on which the lumber was piled. These pieces projected over the sides of the car so that one man could ride on each projecting end. When ready to start, the foreman directed James Wood, one of the crew, to put on the car a long 2 by 4 scantling, saying: "Boys, put that on so we can use it for a brake in case there is a train going ahead of ours that might take the frost off the rails. * * * We might need the

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brake. It is a heavy grade down here." The car had been greased that morning before starting. Prior to that occasion, when going to work, the push car had always been the first over the track, so that the frost in front of the wheels retarded its progress; but on this morning a train had gone ahead and taken the frost off the rails. Twice before the accident occurred the car was stopped by the use of the scantling as a brake. After taking a flagman on at the second stop the car was started again. The testimony of James Wood is a fair statement of what, from all the evidence, occurred next. He testified: "We ran along, then, until we came pretty near where we struck the next heavy grade. Then the car began to run, and Barrett told me to put the brake on again. I handed it to Owens as before, and he applied the brake. The foreman told me to put the brake on and check her before we came to the curve ahead of us, and I put the brake on with Owens' assistance, and I bore down on the brake, and the brake ran over the wheel, jerked it out of my hand." The scantling forcibly struck the ground in front of the car, derailed it, threw the plaintiff with great force to the ground, causing the injuries complained of.

Powers & Marioneaux, for appellant.

C. O. Whitmore and Pannel Cherrington, for respondent.

RITCHIE, District Judge (after stating the facts). The reasons urged by appellant for a reversal of the judgment are substantially two: (1) The injury was caused by an accident resulting from Barrett's negligence, and he was a representative of the master, and not a fellow servant. (2) The court in directing a verdict failed to specify the particular grounds that would justify such action.

The accident which caused appellant's injury occurred in the state of Nevada, and the fact is stipulated in the record that there is no statute in Nevada defining any doctrine relating to fellow servants, and that the common law prevailed in that state at the time of this accident. The appellant rests his claims for right to recover on the doctrine which is commonly called, somewhat vaguely, the "superior-servant doctrine." Several Utah cases are cited in the appellant's discussion of the matter in his brief. It is not necessary to determine whether this rule was ever established in this state independent of statutory provisions. The relations between master and servant are now defined in large measure by statute, and the question is of consequence only when matters arise for investigation which have occurred in other states and are therefore to be interpreted by the laws of such states. Unfortunately there is neither statute nor judicial decision in the state of Nevada which aids the court in ascertaining what the law of that state is, except the statutory provision that the common law is in force. Considering, however, that the question is one of difficulty, obscured by contradictory decisions in different jurisdictions, and bearing in mind, also, that the superior servant doctrine has not been accurately defined

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in any formula which has been generally accepted in all the jurisdiction upholding it, this court should not undertake to determine whether it is or is not a part of the law of the state of Nevada, unless it is essential to a decision in this case. We do not think it is essential. We deem it clearly proven, not only that the operation of the doctrine of common employment is not defeated by the fact that the foreman controlled the injured servant, but, further, that the foreman was in any event a mere fellow servant as to the occurrences which gave rise to the injury. The plaintiff and the other workmen on the morning in question were engaged in their ordinary work. The matter of going to and from the camp to the place of work and transporting the materials was as such a part of their work as actually laying timbers on the bridge. The plaintiff was 52 years old, and, so far as the evidence shows, a carpenter of no less experience than his fellow workmen, including the foreman. So far as the exercise of judgment or prudence in pursuing their work depended upon their experience in the ordinary affairs of life outside of their skill as carpenters, they were on a common level, and there is nothing showing that the foreman had any greater experience than the others upon which he might have founded a better judgment. The unusual things occurring that morning, which in part contributed to the accident, where the grade was steeper than usual, a train had passed before them and taken the frost off the rails, and the running gear of the car had been freshly greased. Each workman could judge of these matters and consider what would be wise and prudent in managing the car as well as the foreman, and these facts did not place upon him as the representative of the company any additional responsibility. There was nothing about the situation as thus presented which was not perfectly open and obvious to all the workmen. The risks and dangers, such as they were, were incident to the manner of conducting their work, and were a part of the ordinary risks of their employment assumed by them. The following cases, selected from among a large number involving somewhat similar circumstances, illustrate the principles involved: *Northern Pac. R. R. v. Peterson*, 162 U. S. 348, 16 Sup. Ct. 843, 40 L. Ed. 994; *Hofnagle v. N. Y. Cent. R. R.*, 55 N. Y. 608; *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017; *Cates v. Itner*, 104 Ga. 679, 30 S. E. 884; *Andre v. Winslow Elevator Co.*, 117 Mich. 560, 76 N. W. 86; *McLaughlin v. Camden Iron Works*, 60 N. J. Law, 557, 38 Atl. 677; *Hughes v. Leonard*, 199 Pa. 123, 48 Atl. 862. We must conclude that there was no act of the foreman which would charge the defendant with negligence.

Reversal of the case is asked also because the defendant did not specify why a verdict should be directed, and because the court did not give its reasons for directing a verdict for the defendant. We see no reason for extending the rule requiring that a motion for a nonsuit should be based upon specific reasons to include a motion to direct a verdict. A trial court, when asked to direct a verdict, may require the moving party to state his

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reasons if the circumstances of the particular case requires it; but there is no merit in the proposition that the court should be required to specify its reasons for directing a verdict. It is true, as appellant asserts in his brief, that courts sit to administer justice, not to take advantage of an oversight or inadvertence of a litigant or his counsel. The fundamental principle guiding the courts in judicial proceedings require that the courts take due care to see that justice is done; but we cannot see that the recognition of this duty demands the establishing of the rule contended for. Trial courts will no doubt, according to the circumstances of each case, so far as within their power, see that substantial justice is done, and such a rule is not needed to aid them in that regard. The only cases cited in support of the defendant's position are from Michigan, and further research has failed to discover others elsewhere. The later decisions in Michigan qualify the rule previously made in that state by declaring that, where a "proper result has been arrived at," the action of the trial court will not be reversed for granting a motion to direct a verdict in the absence of a specification of reasons.

The judgment of the court below is affirmed, with costs.

MCCARTY, C. J., and FRICK, J., concur.

ST. LOUIS, I. M. & S. RY. CO. *v.* STANDIFER et al.

(Supreme Court of Arkansas, Jan. 7, 1907.)

[99 S. W. Rep. 81.]

Master and Servant—Death of Servant—Railroads.*—Kirby's Dig. § 6607, requires the employees in charge of a running train to keep a lookout for persons and property on the track, and provides that in case of an injury the burden of proof shall devolve on the railroad company to show that this duty has been performed; and section 6773 declares that railroads shall be responsible for all damages to persons and property caused by the running of trains within the state. Held, that where intestate, a brakeman in defendant's employ, while operating a hand car on defendant's track, was killed by a passenger train, the fact of the accident was sufficient to establish a prima facie case of negligence on the part of the railroad company.

Death—Damages—Elements.†—Where, in an action for the wrong-

*For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see foot-notes appended to *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to *Norfolk & W. Ry. Co. v. McDonald's Adm'x (Va.)*, 22 R. R. R. 101, 45 Am. & Eng. R. Cas., N. S., 101; foot-notes appended to *Vissman v. Southern Ry. Co. (Ky.)*, 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; *St. Louis, etc., R. Co. v. Hill (Ark.)*, 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20.

†For the authorities in this series on the subject of the elements of the damages recoverable for the death of a parent, see foot-note appended to *International, etc., Ry. Co. v. McVey (Tex.)*, 18 R. R. R. 505, 41 Am. & Eng. R. Cas., N. S., 505.

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ful killing of decedent, it was shown that he was an honest, industrious man, kind to his children, sent them to school as much as his means allowed, and labored for their support, it was proper for the jury to consider damages sustained by such children from any loss of their father's parental instruction and training.

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Action by Susan A. Standifer and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant.

Oldfield & Cole and *Wright & Reeder*, for appellee.

RIDDICK, J. This is an action by the widow and children of T. Y. Standifer against the Iron Mountain Railway Company to recover damages for his death. Standifer was employed by the company as a section hand, and, while he with other employees was on a hand car which was being propelled along the railway track, the car was overtaken and struck by the engine of a passenger train, and Standifer was killed.

The circuit court told the jury, in substance, that, as Standifer was struck and killed by the train of the defendant company, this made out a prima facie case of negligence against the company, and that to escape liability the company must show either that its employees in charge of the train were not guilty of negligence, or that Standifer was guilty of contributory negligence. Counsel for defendant contends that this instruction was erroneous, for the reason that Standifer was an employee of the company at the time of the accident. It is true that it has been held by this court that when an employee of a railway company is injured by a defect in the machinery or track of the railway company, the injury under such circumstances does not of itself raise a presumption of negligence on the part of the master. *St. L. & S. F. Ry. Co. v. Hill* (Ark.) 94 S. W. 914; *Railway v. Harper*, 44 Ark. 529; *Patton v. T. & P. Ry.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361. But the death of Standifer was not caused by a defect in machinery or track. He was not one of those in charge of the train that caused his injury. While riding on a hand car he was struck by a train and killed. If the accident was due to the negligence of the employees of the company in charge of the train, it was either negligence in failing to keep a lookout, or negligence in failing to stop the train after Standifer and those on the hand car were seen on the track. Now the statute not only requires that the employees in charge of a running train shall keep a constant lookout for persons and property on the track, but provides that in case of an injury "the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed." Kirby's Dig. § 6607. Another statute provides that railroads in this state "shall be responsible for all damages to persons and property done or caused by the running of trains in this state." Kirby's Dig. §

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6773. The construction given to this latter statute is that, where, in an action for damages against the company for causing the death of a person, it is shown that the person was killed by being struck by a train, a prima facie case of negligence is made against the company, and it devolves on the company to show that its employees in charge of the train exercised due care, or that the deceased was guilty of contributory negligence, unless these facts appears from the evidence of plaintiff. The fact that the person struck by the train was in the employ of the company at the time of the accident does not change the rule in this respect, though it may bring in the question of assumption of risks or other questions of that kind. We are therefore of the opinion that the objection to this instruction must be overruled. *Railway Co. v. Blewitt*, 65 Ark. 235, 45 S. W. 548.

It was shown that Standifer was an honest and industrious man, that he was kind to his children, sent them to school as much as his means allowed, and labored for their support. Under these circumstances it was not improper for the court to tell the jury that, if they found for plaintiffs, the minor children of Standifer, they could, in assessing the damages, take into consideration any damages sustained by them from loss of his parental instruction and training, if they believed "from the evidence that he would have been thus beneficial." *Railway v. Sweet*, 60 Ark. 559, 31 S.W. 571.

The only other contention is that the verdict is not sustained by the evidence. It is said that the train approached the place of accident around a curve, and that it was within 300 feet of the hand car before it could have been seen, and that it was impossible to stop the train within that distance; but there was also evidence tending to show that a person on the side of the engine where the fireman sat, which was on the inside of the curve, could have seen the hand car and those upon it at a much greater distance than 300 feet. This evidence, to some extent, contradicted that of the engineer and fireman, and the question as to whether the train could have been stopped in time to have avoided the injury was therefore one for the jury.

Judgment affirmed.

CANON v. SHARON & W. ST. RY. CO.

(Supreme Court of Pennsylvania, Jan. 7, 1807.)

[65 Atl. Rep. 795.]

Corporations—Malicious Prosecution—Act of Officer—Liability of Corporation.*—An action for malicious prosecution will not lie against

*For the authorities in this series on the question whether a railroad company can be held liable on account of arrests and prosecutions made or instigated by their employees or agents, see foot-notes appended to *Davis v. Chesapeake & O. Ry. Co.* (W. Va.), 23 R. R. R. 1, 46 Am. & Eng. R. Cas., N. S., 1; *Milton v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 653, 41 Am. & Eng. R. Cas., N. S., 653; foot-notes appended to *Baltimore & O. R. Co. v. Deck* (Md.), 18 R. R. R. 640, 41 Am. & Eng. R. Cas., N. S., 640.

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a corporation, where the prosecution was instituted by its superintendent to vindicate the law against an alleged offender, where no authority of the superintendent so to act was shown, nor was there a subsequent ratification of the corporation.

Appeal from Court of Common Pleas, Mercer County.

Action by R. A. Canon against the Sharon & Wheatland Street Railway Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

From the record it appeared that the plaintiff was employed as a conductor by the defendant company, and that on September 16, 1902, an information was made against him by Godfrey Morgan, general superintendent of the railway company, charging him with embezzlement and larceny of the defendant company's money. At a subsequent trial plaintiff was acquitted. The court entered a nonsuit, saying: "There being no evidence in this case defining the duties of Mr. Morgan, who was the superintendent or general superintendent of this railway company, the defendant, and there being no evidence that the making of the information against Mr. Canon was within the scope of any authority conferred upon him by the defendant company, and there being no evidence that the defendant company had any knowledge of this suit, of the prosecution against Mr. Canon, at the time it was commenced or after it was commenced, and while being prosecuted, the motion for a compulsory nonsuit on the part of the defendant is granted, with leave to plaintiff to move to take the same off within four days."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

J. G. White and *J. A. McLaughry*, for appellant.

S. H. Miller and *Norris, Jackson & Rose*, for appellee.

BROWN, J. The prosecution of the appellant for alleged embezzlement was instituted by Godfrey Morgan, the superintendent of the Sharon & Wheatland Street Railway Company. He was acquitted, and brought this action against the company for malicious prosecution. Its responsibility for the prosecution depended upon the authority of Morgan, as its superintendent, to institute the same as its act. Under his general powers as superintendent there was no implied authority to commit the company to the prosecution. It was for an offense alleged to have been already committed. For the protection of the property of the company that might have been in danger he might have had implied authority to invoke criminal process for the prosecution of the offender; but in seeking to hold this appellee for the alleged wrongful and malicious act of its superintendent, or agent, in instituting a criminal prosecution, not for the recovery or prosecution of any of its property, but for the sole purpose of vindicating the law through the punishment of an alleged offender, either express precedent authority of the agent or subsequent ratification and adoption of his act by the

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corporation must be shown. In the recent case of *Markley v. Snow*, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685, this is fully discussed, and the authorities cited in support of the rule announced. Among other well-considered cases in which the rule is recognized is *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am. Rep. 311, where it is said: "It is quite clear that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover, it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods; and before the corporation can be made liable for such an act it must be shown, either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation."

There was no evidence as to the scope of the authority of the appellee's superintendent. It was not within his implied power to prosecute the appellant in the name of his company. There was no evidence that it had any knowledge of the prosecution, either at the time it was brought or afterwards. There was, it is true, an offer to prove that it had ratified the prosecution by paying the attorneys retained by Morgan. On objection this offer was disallowed, but its disallowance is not assigned as error. The question before us is whether, on the evidence submitted by the appellant, any express authority was shown in the superintendent to bring the prosecution, or any ratification of it afterwards by the company. No such authority or ratification can be found, and the judgment of nonsuit could not have been withheld.

Judgment affirmed.

CITY OF HICKORY v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 29, 1906.)

[53 S. E. Rep. 955.]

Nuisance—Public Nuisance—Encroachment on Public Rights.*—A railroad freight depot in the center of a town, causing the obstruction

*For the authorities in this series on the subject of railroads, railroad building, etc., as nuisances see foot-note appended to *Townsend v. Norfolk Ry. & Light Co.* (Va.), 19 R. R. R. 635, 42 Am. & Eng. R. Cas., N. S., 635; foot-note appended to *Rainey v. Red River, etc., Ry. Co.* (Tex.), 19 R. R. R. 617, 42 Am. & Eng. R. Cas., N. S., 617; foot-notes appended to *Gossett v. Southern Ry. Co.* (Tenn.), 18 R. R. R. 706, 41 Am. & Eng. R. Cas., N. S., 706; *Davis v. Baltimore & O. R. Co.* (Md.), 18 R. R. R. 699, 41 Am. & Eng. R. Cas., N. S., 699.

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of streets by cars and rendering the streets dangerous, is a public nuisance.

Same—Injunction—Suit by Town.—Where a freight depot in a town constituted a public nuisance, the town, acting through its official board, was a proper party to sue for an injunction.

Same—Remedies of Private Persons—Damages.†—Though a freight depot in a town amounted to a public nuisance, any citizen might recover damages by showing that it was a nuisance to him.

Appeal from Superior Court, Catawba County; Cooke, Judge.

Suit by the city of Hickory against the Southern Railway Company. From the judgment, both parties appeal. Affirmed.

See 50 S. E. 683.

E. B. Cline, T. M. Hufham and Self & Whitener, for appellant.

Witherspoon & Witherspoon and S. J. Ervin, for appellee.

CLARK, C. J. This is an action to restrain the defendant from enlarging its freight station in the town of Hickory; the plaintiff alleging that the increase in traffic and shifting of more trains would make it a nuisance and dangerous, and averring that the defendant can and should locate a building to accommodate its increased traffic at some point further off and not enlarge its present building in the center of the growing and populous town. Both parties appeal, but the whole matter can be treated in one opinion. Three main questions are presented: (1) The title to the lot in controversy; (2) whether the proposed addition of 70 feet at the end of defendant's depot will be a nuisance which the courts can and should enjoin; and (3) whether the plaintiff can maintain this action.

The defendant claimed title as follows: (1) A deed by W. H. Robinson and several others, November 9, 1855, granting to the Western North Carolina Railroad a right of way over their respective lands wherever situated, the same to be "so much and no more of said lands" than said company "would have the right to condemn for its use" under the provisions of its charter. It is admitted that H. W. Robinson was the owner of the lot in question, that the defendant by purchase had succeeded to all the rights and property of said Western North Carolina Railroad Company, and that the right of condemnation extended to 100 feet on each side of the track. (2) A deed from H. W. Robinson to the Western North Carolina Railroad Company, May 26th, 1859, and recorded in November, 1905. (3) The defendant further relies upon section 29, c. 228, p. 264, Acts 1854-55 (the charter of the Western Northern Carolina

†See extensive note, 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519; *Fisher v. Seaboard Air Line Ry. Co.* (Va.), 15 R. R. R. 683, 38 Am. & Eng. R. Cas., N. S., 683; *Pharr v. Morgan's, etc., Co.* (La.), 16 R. R. R. 434, 39 Am. & Eng. R. Cas., N. S., 434; *Gilcrest Co. v. Des Moines* (Iowa), 17 R. R. R. 461, 40 Am. & Eng. R. Cas., N. S., 461; *Davis v. Baltimore & O. R. Co.* (Md.), 18 R. R. R. 699, 41 Am. & Eng. R. Cas., N. S., 699.

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Railroad Company), which is a provision that, "in the absence of any contract" for the right of way, the construction and operation of the road for two years, without claim, shall bar any action for any land covered by the right of way. The railroad was constructed at this point in the fall of 1859, and has been in operation ever since. (4) A deed from H. W. Robinson March 10, 1880, to the Western North Carolina Railroad Company for a lot 400 feet by 500 feet, giving specific boundaries and embracing the station as its central point, conveying said property "for the purpose of a public square around the depot for the free and common use of both railroad and the town of Hickory, not to be built up or exclusively occupied by any one, to the exclusion of the public as a free common." This deed was drawn by the president of the Western North Carolina Railroad Company, who indorsed thereon: "The original deed having been destroyed without record, this deed is accepted in lieu thereof." This deed was proved and recorded in April, 1880. The deed of 1855 was not presented in evidence when this case was before us (137 N. C. 189, 49 S. E. 202), and this point was not passed upon.

We think, therefore, the court did not err in instructing the jury, as a matter of law, upon all the evidence, to find that the defendant owned the 100 feet on each side of the railroad by virtue of the deed of 1855, and that it did not hold that part of the lot in trust for the town, and the jury found, under proper instructions, that the defendant held the balance of the lot under the trust set out in the deed of 1880 (No. 4 above). As to these findings, except the last, the defendant does not appeal, but that exception is without merit, since it was adjudicated to the former appeal. 137 N. C. 189, 49 S. E. 202. Indeed, it is stated in this case (137 N. C., at page 203, 49 S. E., at page 205) that the record shows "the defendant in open court agreed that it did not claim any part of the land described in the deed and plats, except the main track and 100 feet on each side from the center of the track, and that it stood ready to have it so decreed by the order of the court."

This disposes of the plaintiff's appeal.

Defendant's Appeal.

As to the defendant's appeal: It appeared in evidence that the present freight depot is too small to store the goods shipped over the road, and that in consequence a great number of cars constantly stood upon the side tracks; also, that, upon complaint made and after due investigation, the Corporation Commission, in December, 1903, adjudged "that the present depot facilities at Hickory for the handling of freights are insufficient and inadequate, and as at present operated are unsafe," and ordered that the defendant should "provide adequate and safe facilities for the handling of freights" at Hickory. From the order the defendant did not appeal, and, notwithstanding the adjudication that the handling of freight at the present location in the center

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of the town was unsafe, the defendant was proceeding to enlarge its warehouse, whereupon this action was begun, not to compel a removal of the warehouse now there, but to require that the additional facilities should be erected at a point where the increasing freight traffic and additional cars used might be shifted and handled without danger and delays to those crossing constantly from one side of the town to the other. There was ample evidence of the many dangers and inconveniences to the people of the town arising from the handling of the volume of freight at that point at present, and the certainty of increased danger in the future, both from the steady increase in the volume of freight and from the great increase of population in the town, and there was evidence of many eligible locations in or near the edge of the town where the defendant might readily locate its freight depot, separate and apart from its passenger station, as is now usual at all other towns of any size. The court charged the jury that if "the enlargement of the defendant's freight depot by an extension on the eastern side" would "seriously interfere with and interrupt the streets of the town, which are in general use and necessary for the convenience of the citizens and for the business, in respect of travel or course of business, either by obstructing the streets for an unreasonable portion of the time, or by having it so that travelers along said streets, which cross the railroads at public crossings, cannot, by the exercise of reasonable, ordinary care, with safety pass over such crossings, that they should find as to that issue that the enlargement would be a public nuisance, but that, if it would merely give inconvenience to the public or cause some delay in their movements, which is incident to the operation of a railroad, it would not be a nuisance."

The defendant has no just ground of exception to this charge. The jury found that the proposed enlargement would be a public nuisance. Railroads are chartered for the public convenience, and are operated by the exercise of a public franchise. Such exercise must be subordinate to the public welfare, and they are subject to public regulations as to their charges and conduct. If they exercise their functions in such manner as to become a public nuisance, they are liable to damages or to injunctive relief. The operation of their freight business, growing rapidly, as it is shown to be, in the center of a large and growing town, will necessarily impede and render dangerous the circulation of people and business from one side of the town to the other. It necessitates the keeping of many box cars on the side tracks and their constant shifting up and down, cutting off the view of approaching passengers, and, indeed, of other freight trains. The jury has found this dangerous, inconvenient, and a public nuisance. Indeed, we might almost say that it would be a matter of common knowledge. If there are any good reasons why the defendant should have resisted the application of the town authorities, and should not rather have anticipated the public wishes and convenience by removing its freight depot to

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a more suitable location, they do not appear in this record. The plaintiff, acting through its official board, was a very proper party to institute this proceeding to render the passage of its streets across the railroad track safer, and prevent their obstruction by shifting freight cars. While any citizen might have recovered damages by showing that the enlargement of the depot was a nuisance to him (*Railroad v. Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739), it is especially appropriate that this action to prevent a public nuisance should be brought by the municipality in the interest of all its citizens.

While this judgment, which we affirm, restrains only the addition to the freight depot, it is to be presumed that the defendant will not only place the building and side tracks to give the additional freight facilities ordered by the corporation commission at a more suitable spot, where they will not be so dangerous and will not interrupt the traffic of the town, but that it will remove all its freight business to that point.

As to both appeals, we hold that there is no error.

THOMASON et ux. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Oct. 16, 1906.)

[55 S. E. Rep. 198.]

Railroads—Construction and Maintenance—Nuisance—Actions.—In an action for injuries to adjoining owners from the construction and maintenance of a spur track, the question to be determined was whether the railroad committed and maintained a nuisance on a lot adjoining plaintiffs' land, not on the right of way, but outside the right of way.

Same—Construction and Use of Track Outside Right of Way.—Where a railroad erected, on a lot occupied by it outside its right of way, a spur track on a trestle 10 feet high, extending within 5½ feet of the line fence of the adjoining owners, who had acquired their property before the erection of the line, and extending to within 27½ feet of their dwelling and sleeping apartments, and its cars were several times wrecked and dropped over toward the adjoining owners' dwelling, so that they had reasonable grounds to believe and did believe that they were in danger of being hurt, the operation of the track constituted a nuisance, for which the railroad was liable.

Same—Negligent Operation.—Where a railroad company negligently permitted its cars to run off a spur track and knock down the fence of adjoining owners, the railroad was liable for the injuries to the fence.

Same.*—Where a railroad negligently operated its trains over a spur on land outside its right of way, and kept adjoining owners in constant dread, and because of the proximity of the track to the house

*See preceding case, and foot-note.

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of adjoining owners, and because of the soot, cinders, and smoke, their house was rendered less valuable as a residence and was made uncomfortable and disagreeable to the owners, such facts constituted a nuisance, for which the defendant was liable.

Same—Damages.—Where a jury found that the maintenance of a spur track by a railroad company and the operation of its trains thereon was negligent, it was proper, in determining the amount of the damages, to consider the injury to the household and kitchen furniture of adjoining owners, caused by the smoke and cinders which were caused to pass through the house by reason of such use.

Same.—In determining the damages to adjoining owners, owing to the negligent construction and operation of a spur track, it is proper to take into consideration the depreciation in the value of the property and the inconvenience, discomfort, and unpleasantness sustained.

Pleading—Demurrer—Effect of Decision.—Where a demurrer to a complainant is sustained, and an amended complaint is filed, the effect of the ruling on the demurrer as *res judicata* cannot be considered, where it is not presented by the pleading.

Appeal from Superior Court, Nance County; E. B. Jones, Judge.

Action by Henry Thomason and wife against the Seaboard Air Line Railway. From the judgment, defendant appeals. Affirmed.

This action is prosecuted for the purpose of recovering damage alleged to have been sustained by plaintiffs by reason of a nuisance sustained by defendant. It appears from the record that at the institution of the suit plaintiffs filed a complaint setting forth several causes of action, to which defendant demurred. The demurrer to each cause of action was sustained at October term, 1905, and leave given plaintiffs to file amended complaint. A complaint was accordingly filed December 1, 1905. It does not clearly appear in what respect this complaint differs from the first one, to which a demurrer was sustained. In the last complaint plaintiffs alleged that, 20 years prior to the institution of this action, they purchased a lot in the town of Henderson, and have used and occupied it as a dwelling place and residence until the beginning of this action; that said lot was bounded partly by the right of way of the Raleigh & Gaston Railroad, upon which it had, and maintained, tracks over which its engines and cars passed, etc.; that by consolidation and merger the defendant has succeeded to all of the rights, duties, etc., of the said railroad company. Among many other matters and things, not necessary to be noted in this appeal, plaintiffs alleged: That defendant had, since the purchase by plaintiffs of said lot and its occupation as a residence, purchased a lot in excess of its right of way adjoining plaintiffs' lot, upon which it permitted and maintained a coal yard, and it had "negligently and with wanton indifference to plaintiffs' rights and safety maintained through and over said coal yard a trestle, with a spur railway track thereon, some 10 feet above the ground, pointing directly to plaintiffs' sleeping

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room, extending within about 5 feet of plaintiffs' yard fence and within about 20 feet of their sleeping room, and ran cars and locomotives thereon. On two occasions coal cars have been negligently forced over the end of this spur track, and the trucks, with a large portion of the car, suspended in and over plaintiffs' said yard, and within less than half a car's length of their sleeping room, so near that, if the cars had lost their balance or had been run into by other cars and thrown over endwise, they would have crushed into plaintiffs' sleeping room, to the great danger of their lives and property. That on one occasion the car was negligently permitted to remain in such position by the defendant a week or more. The plaintiffs were driven and kept from their usual bedroom by the imminence of the danger which thus threatened them. That they requested the defendant, through its agent, to remove the car and abate the nuisance, which it wanted only and contemptuously refused to do until they engaged counsel, etc. Defendants continued to use the said spur track until some time in March, 1904, when a fast night passenger train, coming into and through the town at a great speed, negligently ran through an open switch upon this track, wrecked their locomotives and a number of coaches, together with the trestle upon which said track was laid, and threw a coal car from said track over the intervening space between such track and plaintiffs' yard, partly into said yard, and within a few feet of their sleeping room, crushing their fence, nearly throwing them from their bed by the violence of the concussion, etc." They alleged that such spur track, together with the negligent manner of its use, was a nuisance, injuring their property, depreciating its value, and otherwise damaging them. Defendant made a specific denial of the matters alleged, and for further answer said: "That the alleged damages charged in the complaint, if any, were the result only of the usual and ordinary incidents of operating railroads, which no care, caution, or foresight of the defendant could have presented, and the defendant alleges that it was guilty of no negligence or want of due care in the construction and maintenance of its said railroad spur tracks, etc.; and for further defense this defendant says that, more than 20 years before the commencement of this action, it and its predecessor, the Raleigh & Gaston Railroad Company, erected its said railroad and spur tracks, and have been in the peaceable and undisturbed possession and maintenance thereof since then up to the bringing of this action, and by said 20 years of quiet, peaceable, and undisturbed use of said railroad spur tracks, rights of way, coal and wood yards it has acquired a prescriptive right to operate and use the same, and this defendant pleads said 20 years' use and prescriptive right in bar of any recovery herein."

Defendant, when the cause was called for trial, demurred ore tenus to the several causes of action set forth in the complaint. The court sustained the demurrer as to all of the causes of action, except the fourth, to wit: "The defendant demurs

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to so much of the plaintiff's complaint as alleges damage by the construction of side tracks into and for the benefit of said coal and wood yard, for failure to state a cause of action, because the Seaboard Air Line Railway is authorized by law to engage in the business of a common carrier, and in order to properly carry on said business it is its duty to construct side tracks for the accomodation of the authorized enterprises constructed and operated along its right of way, and it is not liable for damage resulting from the lawful performance of such duty." The judgment of his honor upon the demurrer concludes: "That is to say, that all the grounds of demurrer as to the different causes of action in said complaint are sustained, except the cause of action for damages to plaintiff's fence and whatever damages the defendant may have caused the plaintiff by reason of the construction and operation of the spur track on the lot of land used for a coal and wood yard, other than injuries to fence and plaintiffs' health." To this judgment defendant excepted. Defendant thereupon asked leave to amend its answer by setting up the judgment of October term, 1905, sustaining the demurrer to the original complaint, as res judicata of the plaintiffs' cause of action. Motion denied. Defendant raised the same question by an exception. The cause went to trial upon the following issues, resulting in a verdict, as set forth: "(2) Did the defendant commit and maintain the nuisance complained of? Ans. Yes. (3) What damage, if any, has plaintiff sustained by reason of the nuisance complained of? Ans. \$450. (4) What damage, if any, has plaintiff sustained by reason of damage to his household and kitchen furniture? Ans. \$50. (5) What damage, if any, has plaintiff sustained by reason of the destruction of his fence? Ans. \$10." Defendant pleaded the statute of limitations, but no exceptions appear in the record in regard to his honor's rulings thereon. There was judgment upon the verdict, and defendant appealed.

Day & Bell, Murray Allen, and J. H. Bridgers, for appellant.
H. M. Shaw and T. M. Pittman, for appellees.

CONNOR, J. (after stating the case). It will be convenient to first dispose of defendant's exception to his honor's refusal to sustain the fourth cause of demurrer. This calls into question the right of plaintiffs, upon the allegation in the complaint, to proceed with their proof. If this contention be correct, it becomes unnecessary to examine the other exceptions. The question presented by the demurrer is both interesting and important. It has been so frequently and so thoroughly considered and discussed by courts of the highest authority that but little is left to be done save to apply well-settled principles applicable to it. The judgment upon the other causes of demurrer eliminates, for the purpose of this appeal, a number of questions, and presents the single proposition advanced by the plaintiffs that, conceding to the defendant its right "to do a lawful thing in a lawful way," they are entitled to recover on the cause of

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action stated in the complaint. Freed from the formal or technical verbiage, the case developed by the complaint is simply this: Plaintiffs own a lot, upon which is located their dwelling, in the town of Henderson. Defendant owns and operates, pursuant to its charter, a railroad, the right of way of which abuts upon plaintiffs' property. Defendant, for the better conducting its business of common carrier, purchased a lot adjoining plaintiffs,' which it permits to be used as a coal yard. For the delivery of coal and other purposes defendant has constructed over said lot a spur track, a portion of which is a trestle or coal chute, some 10 feet above the ground, pointing directly to plaintiffs' dwelling, extending within about 5 feet of plaintiffs' fence and 20 feet of their sleeping apartment. Plaintiffs allege that the location of this track and its construction and proximity to their dwelling is per se a nuisance, menacing the safety of their persons and property when used in the ordinary way, and causing noises, dust, smoke, and other disagreeable and injurious nuisances. They further say that the defendant has negligently used the track, specifying several instances in which they were threatened with injury, and one in which their property sustained physical injury and they were compelled to abandon their bedroom by the violent concussion caused by the collision of defendant's trains. Adopting Blackstone's definition, there can be no doubt that the facts set forth in the complaint constitutes a private nuisance. "Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 16 Am. & Eng. Enc. 682. "An act or use of property, to constitute a nuisance, must violate some legal right, either public or private, and must work some material annoyance, inconvenience, or injury, either actual or implied from the invasion of the right." Id. 686. The defendant says that, conceding the damage done plaintiffs, they have no cause of action, or that the damage done is not an actionable nuisance, for that defendant was acting within its chartered rights, or, as expressed in many of the authorities cited, "doing a lawful act in a lawful way." This contention is based upon the elementary proposition: "That no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner." Pollock on Torts (7th Ed.) 128. The principle applied to railroad companies, as quasi public agencies assimilating them. in this respect, to municipal corporations, has been well stated in an exceedingly able opinion by Beasley, C. J., in *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164: "They are not responsible for those incidental damages that result from the proper exercise of their functions."

The principal applied to municipal corporations is recognized by this court in *Meares v. Wilmington*, 31 N. C. 73, 49 Am. Dec. 412. In that case the municipal authorities, in grading a street, removed the earth to the depth of several feet, causing the plaintiffs' lot adjoining the street to fall, bearing with it a brick wall, to plaintiffs' damage, etc. Defendant contended that by its char-

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ter, and ordinance passed pursuant thereto, it was empowered to grade the street, and that by reason thereof it was not liable to plaintiff, whether due caution was used or not. His honor instructed the jury that the act of defendant was lawful, provided it was done with due caution, etc. From a judgment for plaintiff, defendant appealed. Pearson, J., said: "If the defendants had caused the grading to be done with ordinary skill and caution, and, by the erection of a substantial wall as the excavation proceeded, had so managed as to prevent any caving in of the plaintiffs' lot, so that the damage, if any, would have resulted, not from a want of ordinary skill and caution, but merely from the fact that, by reason of the grading, the lot was left higher above the level of the street, and so was more difficult of access and therefore less valuable, the case would have presented a very grave question; and we are strongly inclined to think, with his honor, that the plaintiffs would have been without remedy, for, as it was lawful for the defendants to do the work, if it was done in a proper manner, although the plaintiffs were damaged thereby, it would be *damnum absque injuria* and give no cause of action." The principle announced in this case was approved with much caution in *Wright v. Wilmington*, 92 N. C. 156. This may be regarded as the settled doctrine in this state. *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264. In *Salisbury v. Railroad*, 91 N. C. 490, Smith, C. J., says that the question whether the same principle applies to railroads is not presented, and therefore is not "passed upon." He further says: "We do not understand the counsel for the defendant to deny that if the power conferred in the charter was exercised negligently and without a due regard to the interest of others, and an injury was suffered in consequence, the company would be exposed to an action for redress in some form," citing *Meares v. Wilmington*, *supra*. While in the very well-considered and exhaustive brief of defendant many cases are cited in which railroad companies are given the same immunity from actions for consequential injury to property sustained by the lawful exercise of power as municipal corporations, this court, in *Staton v. Railroad*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838, in an opinion by Shepherd, C. J., denies such immunity. It is there held that the authority granted to a corporation by its charter to construct a railroad does not thereby confer upon it an immunity from liability for damages to others in respect to their adjacent lands, when, under the same circumstances, a private individual would be liable. That case involved the question of the right of an adjacent landowner to recover damages for flooding his land by the construction of ditches on defendant's right of way. It may be noted that such flooding of the lands amounted to a "taking" and comes within the elementary principles that in such cases compensation must be made. For the purpose of disposing of this appeal it is not necessary to further discuss the question presented in *Staton v. Railroad*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. From either viewpoint the limitation is always annexed that the right be exercised "in

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a lawful way"; that is, in respect to those who suffer damage with due care for their rights. When done negligently, and without due regard for such rights, there is *damnum et injuria*—that is, in contemplation of the law, *injuria*—which is always actionable. We find the same limitation imposed upon the doctrine in all of the cases from other jurisdictions cited in defendant's brief. In a well-sustained opinion by Judge Keith in *Fisher v. Railroad*, 102 Va. 363, 46 S. E. 381, he concludes the discussion with this language: "But, in order to secure this immunity, the power given by the Legislature must be exercised without negligence and with judgment and caution. For damage which could not have been avoided by any reasonable, practicable care on the part of those authorized to exercise the power, there is no right of action; but they must not do needless harm, and, if they do, it is a wrong against which the ordinary remedies are available." Pollock on Torts, 129.

In a case strikingly similar to ours (*Balt. & Pot. Railroad v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739) it appeared that, under the powers conferred upon the defendant to erect such works as it might deem necessary and expedient for the completion and maintenance of its road, it erected in the city of Washington, in close proximity to the defendant Baptist Church, an engine house, machine shop, etc., and used them in such a way as to disturb the congregation assembled in the church, interfere with religious exercises therein, break up the Sunday schools, and destroy the value of the building as a place of worship. For the purpose of recovering damages the church instituted an action. The same defense was relied upon as in this case. Field, J., said: "Plainly the engine house and repair shop, as they were used by the railroad company, were nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as place for religious exercises; * * * that is, a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. * * * It is to answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skillfully constructed. * * * In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and right of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may

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acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification: That the words should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship." The case is cited with approval in *Bates v. Holbrook*, 171 N. Y. 460, 64 N. E. 181; *Ridge v. Penna. Railroad Co.*, 58 N. J. Eq. 172, 43 Atl. 275, in which the Chancellor says: "Therefore the right of this company to use the strip of land upon which the three tracks are placed * * * for terminal purposes does not include the right to use them for all purposes to which a terminal yard may be devoted. The company is bound to take into consideration the environments, and adjust its operation so as to produce the least annoyance to persons and property, in placing the instrument necessary to its business." In *Willis v. K. & I. Bridge Co. (Ky.)* 46 S. W. 488, citing the Church Case, it is said: "Whenever a railroad company has been granted authority to use a street, it is accompanied with an implied qualification that its use shall not unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Such a grant does not license the railroad company to use the street in disregard of the private rights of others and with immunity for their invasion." In *Chicago G. W. Railway Co. v. First Methodist Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, in which it appeared that the company erected a hydrant in a street opposite the church and built tracks to it, in the use of which the engines made noises, emitted smoke, cinders, etc., a right of an action was sustained by the Court of Appeals.

Defendant insists that this appeal is to be distinguished from the Baptist Church Case because "(1) it did not appear that the

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railroad had the proper legislative authority to construct and use the building complained of in the place at which it was located, and it appeared affirmatively that it was at an unreasonable place." It appeared that the road was, by its charter, empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion of maintenance of its road. The defendant's charter is in substantially the same language. The location of the road was expressly permitted and approved by Congress. Conceding that the location of the spur track upon the lot purchased by defendant for that purpose was authorized by the charter, the complaint is that by the construction of it, the trestle pointing directly to plaintiffs' dwelling and extending to within a few feet of his fence and 27 feet of his dwelling, it would seem that, considering the purpose for which it was built and was to be used, it was at least a menace to plaintiffs' property. In *Romer v. Railway Co.*, 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455, it is said by the court that no negligence was imputed to defendant. In *Dolan v. Railroad* (Wis.) 95 N. W. 385, a recovery was denied for a nuisance in maintaining a stockyard, because it was not shown that the location was not a reasonably proper one, or that the company did not use reasonable diligence in preventing unhealthy conditions. The distinction is apparent. This contention is, we think, met by the language of Judge Field above quoted. Conferring the power to erect all structures, buildings, etc., necessary and convenient for its business cannot be construed to empower it to locate and use them as it might think proper without reference to the rights of others. *Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954; *Ridge v. Railroad*, 58 N. J. Eq. 172, 43 Atl. 275. To give it such a construction would impute to the Legislature a disregard of private rights, trenching closely upon, if not in violation of, constitutional limitations. In *Railroad v. Meth. Epis. Church*, supra, it is said: "If two private citizens own adjacent lots, one of them cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot without making compensation for the injury, and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting owner of the beneficial use of his property, without making compensation for the injury." Defendant says that the cases are distinguished, in that "the engine house was a part of the defendant's private works, used exclusively for its private business, and bearing no relation to the public." We do not find that the court so regarded the engine house; on the contrary, the entire discussion proceeds upon the theory that defendant was acting within its chartered powers, but in violation of the duty imposed to use them in a reasonable manner and with due regard to the rights of others. However this may be, the plaintiffs aver that in the use of the trestle defendant was negligent, specifying several instances in which it

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is alleged there was a gross negligence. In *Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421, holding that a stable in a town was not per se a nuisance, Ruffin, C. J., says: "But, on the contrary, if they be so built, so kept, or so used as to destroy the comfort of persons owing and occupying adjoining premises and impair their value as places of habitation, stables do thereby become nuisances." We do not discuss the question whether the rights of the plaintiffs are affected by the fact that the spur track and trestle were on a lot purchased by defendant for use as a coalyard, as distinguished from a like use of land covered by the right of way. Without entering further in this domain, wherein frequent attempts to restate the doctrine has sometimes led to obscurity, we conclude that his honor correctly overruled the demurrer. The allegation is specifically made that defendant wantonly and negligently created, maintained, etc., the nuisance, specifying each negligent act. These terms are repeated in respect to each act complained of, and permeate the entire complaint in respect to this cause of action.

Postponing the consideration of several exceptions to rulings upon the admissibility of testimony, we proceed to examine such as relate to his honor's instructions. After stating the contentions of the parties his honor said: "So, then, gentlemen, the question is for you to find as to whether the defendant in this case committed and maintained, caused, and continued a nuisance on the lot adjoining plaintiffs', not on the right of way, but outside of the right of way and next to and adjoining the plaintiffs' lot." To this defendant excepted. We find no error in this. His honor clearly stated to the jury the limits within which, by the judgment upon the demurrer, he had restricted plaintiffs. His honor proceeded to instruct the jury: "So, if you find by the greater weight of evidence that the lot occupied and used by the defendant is off its right of way, and adjoining the plaintiffs' lot; that plaintiffs acquired their lot and erected a dwelling on same before the defendants built the spur on its lot, and commenced to use the same as a dwelling; that the end of the spur track was insecurely built, or not safely constructed; that it extended to within 5 1-2 feet of the plaintiffs' line fence, and to within 27 1-2 feet of plaintiffs' dwelling and sleeping apartments; that defendant's cars were several times wrecked and dropped over towards the plaintiffs' dwelling; and that by reason of this fact the plaintiffs had reasonable grounds to believe and did believe that they were by reason of the proximity of the track in danger of being hurt—then if you find these facts to be true from the evidence, and by the greater weight of the evidence, the court charges you the operation of the spur or track by the defendant under these circumstances would create a nuisance on the part of the defendant; and plaintiffs would be entitled to recover if you find this condition existed within three years prior to the bringing of this action." "And if you shall find from the greater weight of the evidence that the defendant negligently and carelessly permitted its cars to run off of the spur track and knock down plaintiffs'

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fence, then the plaintiffs would be entitled to recover of the defendant the damage to the fence, caused by reason of the negligence of the defendant in throwing its cars on the fence, if you find that it was negligence." "If the jury shall find by the greater weight of the evidence that the defendant operated its engines and cars over the spur in a reckless and careless manner, and because of the proximity of the defendant's track to the residence of the plaintiffs it kept the plaintiffs in constant dread and fear; and you shall further find that because of his proximity of defendant's track to plaintiffs' house, and because of the soot, cinders, and smoke, the plaintiffs' house was rendered less valuable as a residence, and made the house uncomfortable and disagreeable to its occupants, and plaintiffs—then these facts and circumstances if proven by the greater weight of evidence, would make the acts of defendant a nuisance." These instructions, we think, are sustained by the authorities which we have cited in regard to the ruling upon the demurrer. They fairly present to the jury the averments contained in the complaint, upon which there was testimony; in fact, there was no contradictory testimony in respect to the damage sustained by plaintiffs. Several of defendant's witnesses corroborated the plaintiffs' evidence.

His honor further instructed the jury: "Or if you shall find from the evidence, and by the greater weight of evidence, that the defendant in operating its engines and cars upon the spur track on the lot adjoining the plaintiffs' lot, and in so doing you find that its engines emitted such smoke, cinders, and threw out such smoke and cinders through the windows and doors of the plaintiffs' house, and injured the plaintiffs' property, his household and kitchen furniture, the plaintiffs would be entitled to recover for damages thus sustained." Defendant insists that in this instruction his honor eliminated the question of negligence and permitted the plaintiffs to recover damage to their furniture for smoke, cinders, etc., emitted from the engines. The charge must be so read that each portion shall be construed in the light of the whole. While it is true that for smoke, cinders, etc., emitted by engines in the ordinary operation of the business of defendant, no action lies, yet when, as in this appeal, there is evidence that the engines were used upon a structure and under conditions which the jury have found to be negligent, it would seem that the damage inflicted by them is proper to be considered by the jury. The instruction is in accordance with the opinion in the case of *Railroad v. Baptist Church*, supra. The testimony in regard to the damage sustained from this annoyance was clear, and, taken in connection with all the facts in the case, we think it was competent for the jury to consider it in fixing the damage. In regard to the measure of damages, his honor instructed the jury that they should consider all the circumstances, the depreciation in value of the plaintiffs' home as a dwelling during the three years next preceding the bringing of the action, the inconvenience, discomfiture, and unpleasantness sustained. The instruction in this respect is fully sustained by the authorities. It

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seems to have been drawn with reference to the language of Judge Field in the Church Case. We find in all that is said in the case authority for the ruling of his honor. While we have carefully examined a number of cases cited in defendant's brief, we have found no other so nearly analogous to this appeal. While recognizing the general principles governing the liability for railroads of actions for nuisances, it is founded upon sound reason and principles of manifest justice.

The exceptions in regard to the admission and rejection of testimony were not pressed in this court, and we do not find in them any reversible error. The case was tried upon the theory of a negligent and unreasonable use of the powers conferred upon defendant by its charter, and, as we have seen, the very great weight of authority recognizes this limitation upon the maxim that no action lies for "doing a lawful thing in a lawful way." It is difficult to conceive how the law could be otherwise, or how it can be said that to do any act, however lawful, without a due regard to the rights of others, to be affected thereby, is doing such act in a "lawful way." While large powers are of necessity granted to railway companies in the construction and operation of the business in which they are engaged, and by which, when properly restrained, the public welfare is promoted, it would be contrary to fundamental principles of law and conceptions of natural justice to say that the Legislature will, or can, confer upon any person, either natural or corporate, absolute and uncontrolled power to injure or destroy the property of the citizen without making compensation. No matter how extensive the power conferred, it must not be exercised in any unreasonable or negligent way so to injure others in their enjoyment of their property. Within this limitation the principle of immunity from liability for "doing a lawful thing in a lawful way" is sound and salutary. Without the limitation it confers arbitrary power to be exercised in an arbitrary manner.

The effect of the judgment upon the demurrer to the first complaint, as an estoppel, is not presented by any pleadings. The defendant answered the amended complaint, and did not set up the judgment upon the demurrer. The request to amend was denied. The exception to his honor's refusal to hold with defendant in that respect cannot be sustained.

We find, upon an examination of the entire record, no error.

THOMASON et ux. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Aug. Term, 1906.)

[55 S. E. Rep. 205.]

Railroads—Injuries from Operation—Liabilities on Consolidation of Companies—Rights of Abutting Owner.—That a railroad company owning a short line has consolidated with other companies so as to

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form a through line, whereby the use of the right of way at a particular station is greatly increased, to the increased annoyance of an abutting owner, does not effect such owner's rights as against the railroad.

Same—Action—Pleading.—Where a complaint alleges that a railroad has wantonly and negligently created and maintained on its premises adjoining plaintiff's land a nuisance, consisting of the use of certain side tracks in such manner as to cause injury to the plaintiff from the noise, smoke, and vibration incident to such use, the legal effect of the allegations is that the use of the tracks for the purposes named constitutes, as a matter of law, a wanton and negligent nuisance.

Same—Nuisance.*—The use by a railroad company of side tracks on its right of way for its regular traffic and for the storing of engines used on the branch line, in a reasonable manner, is not a nuisance for which it is liable to an adjoining owner, though causing annoyance and injury to his property by reason of the noise, smoke, cinders, and vibration incident to such use.

Appeal from Superior Court, Nance County; E. B. Jones, Judge.

Action by Henry Thomason and wife against the Seaboard Air Line Railway. From the judgment, plaintiffs appeal. Affirmed.

Plaintiffs alleged that they were, and had been for many years, the owners of a lot, upon which was situate a dwelling occupied by them as a residence, in the town of Henderson; that prior to 1887 the Raleigh & Gaston Railroad, being about 96 miles in length, ran near to, and its right of way abutted upon, plaintiffs' lot; that in 1889 the Durham & Northern Railroad was constructed, Henderson being one of its termini; that the original corporations, in 1901, were merged into and with other roads formed the defendant corporation; that by such merger a great through line of railroad was established, more than 1,000 miles in length, which has since been greatly increased, and the traffic has been such as to greatly increase the burdens upon lands lying along its lines far beyond the damages paid or contemplated in the creation of the Raleigh & Gaston Railroad, for which no compensation has been made; that since plaintiffs' purchase of said lot the defendant and its predecessor, the Raleigh & Gaston Railroad Company, have wantonly and negligently created and maintained and permitted on their premises, adjoining and contiguous to plaintiffs' land, such nuisances as to greatly endamage plaintiffs in their comfort, persons, and property, by rendering their said dwelling house and premises unfit and dangerous for occupancy as a place of residence, and interrupt their quiet and peaceable occupation thereof, which said nuisances consist in the use of certain side track or tracks immediately in rear of plaintiffs' said premises and within a few

*See preceding case, and foot-notes.

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feet thereof as a hostlery for storing, standing, and keeping the locomotives of the Durham & Northern Division of the defendant's railways, when not in use, the yard engine of the defendant at Henderson and such other engines of the defendant as may for any cause be in Henderson, and not in immediate use (Henderson being a terminal of said Durham & Northern Division). Here such locomotives were kept at night and on Sundays and at other times when not in actual service, and cleaned, fired, steamed, and kept in order, without any roundhouse or other structure inclosing or covering the same, and without chimneys or smoke stacks of sufficient height to carry the smoke, steam, dust, cinders, and odors above the surrounding property. From the engines so placed, tended, and handled there were daily and many times during the day and night the noise of escaping steam, the ringing of bells, and the blowing of whistles. In summer, when the doors and windows of plaintiffs' said dwelling house were open for light and air, smoke and cinders, ashes and dust, were discharged and blown from such locomotives in and through the doors and windows, settling upon the occupants of the house and upon the furniture and furnishings, and soiling clothes, bedding, curtains, and other articles therein, and accompanied by foul and offensive odors, which tainted and corrupted the atmosphere and rendered the dwelling house and premises of plaintiffs unfit for habitation, whereby plaintiffs were greatly annoyed, inconvenienced, discomforted, and damaged, both in their persons and their property. Further, the defendant, as plaintiffs are advised and believe, without authority in their charter to engage in such business, held a lot of land in excess of its right of way, adjoining plaintiffs on the northeast, and let the same as a coal and wood yard, and suffered the lessee or occupant thereof to set up thereon, and to maintain and operate, a steam boiler without spark arrester, engine, and circular saw, near the line of plaintiffs' lot, near their front door, and within 30 or 40 feet of their sleeping room, and plaintiffs were greatly and continuously annoyed and disturbed by the noise therefrom, and their fences, outhouses, and dwelling were greatly in danger from fire.

To the foregoing cause or causes of action the defendant demurred ore tenus. The demurrer sets forth: "(1) The defendant demurs to so much of the plaintiffs' complaint as alleges 'from smoke, noise, odors, and vibrations resulting from the operations of the defendant's railroad,' because such allegation does not state a cause of action, inasmuch as the Seaboard Air Line Railway is authorized by law to operate a steam railroad, and the smoke, noise, odors, and vibrations complained of are the results of the proper operation of such road, and the damage therefrom is *damnum absque injuria*. (2) The defendant demurs to so much of the plaintiffs' complaint as alleges damage from fright or nervous trouble resulting therefrom, for failure to state a cause of action, because fright, unaccompanied by physical injury, is not an element of damage. (3) The defendant demurs

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to so much of the plaintiffs' complaint as alleges injury from the operation of a steam boiler and engine and circular saw on the defendant's property adjoining the plaintiffs' lot, for failure to state a cause of action, because, as is alleged, the said lot was leased for the purpose of establishing thereon a coal and wood yard, which is a lawful business when properly operated, and the defendant is not liable for any damage resulting from a nuisance created by the tenant in the operation thereof. (4) The defendant demurs to so much of the plaintiffs' complaint as alleges damage by the construction of side tracks into and for the benefit of said coal and wood yard, for failure to state a cause of action, because the Seaboard Air Line Railway is authorized by law to engage in the business of a common carrier, and in order to properly carry on said business it is its duty to construct side tracks for the accomodation of the authorized enterprise constructed and operated along its right of way, and it is not liable for damage resulting from the lawful performance of such duty." The defendant demurs to the sixth allegation of said complaint, because the same fails to state a cause of action.

His honor sustained the demurrer, rendering judgment as follows: "After due consideration, it is ordered and adjudged that the first, so far as it applies to the main line, and second, third, and fifth causes of demurrer be, and the same are, hereby sustained. Judgment accordingly." Plaintiffs excepted and appealed.

H. M. Shaw and T. M. Pittman, for appellants.

Day & Bell, Murray Allen, and J. H. Bridgers, for appellee.

CONNOR, J. (after stating the case). Before proceeding to discuss the principal question presented upon plaintiffs' appeal, it will be well to notice the suggestion made in the complaint that defendant's right to use its right of way is limited by conditions existing at the time of the organization of the Raleigh & Gaston Railroad Company and the length of its track when completed. Whatever may be the extent of the rights acquired by the corporation against the owners of the land condemned, when a new corporation is formed by consolidation and merger with other corporations, pursuant to authority conferred by the Legislature, we cannot perceive how the plaintiffs, whose land, so far as appears, was never condemned and no right of way acquired over it, can complain of the enlargement of the business of the company. The right of defendant to operate a railway, carrying on business of a common carrier, with all of its incidental powers and duties, is derived from the statute authorizing the consolidation and the merger effected pursuant thereto. Priv. Laws 1901, p. 463, c. 168; *Spencer v. Railroad*, 137 N. C. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604. Defendant succeeded to the rights of the Raleigh & Gaston Railroad Company, and took them unimpaired. *Dargon v. Railroad*, 113 N. C. 603, 18 S. E. 653. It would seem that, upon the reason of the thing and from the nature of and the purpose for which the powers are granted,

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when the company acquired the right of way, in the absence of any restrictions either in the charter or the grant, if one was made, it became invested with the power to use it, not only to the extent necessary to meet the then present demands, but such farther demands as arose from the increase of its business and the proper discharge of its duty to the public. Any other construction of its charter, in this respect, would defeat the very purpose for which it was created—the growth and development of the resources of the country through which it was constructed. It would seriously interfere with railroads in the discharge of their duty to the public, in a country the population and business of which are rapidly increasing, if, because to meet and encourage these conditions, they doubled their tracks, erected larger depots, made connections with branch lines, etc., new rights of action accrued against them in regard to the use of their right of way. It is immaterial, for the purpose of deciding this appeal, that the Raleigh & Gaston Railroad, originally only 96 miles in length, has become a part of a great trunk line of 1,000 miles, with branch lines connecting at Henderson and other points. It may, if necessary to meet the demands of its enlarged growth, cover its right of way with tracks, and, in the absence of negligence, operate trains upon them, without incurring, in that respect, additional liability either to the owner of the land condemned or others. We therefore attach no weight to the fact that the Raleigh & Gaston Railroad Company has become a part of the defendant's system of roads, or that the Durham & Northern has formed a physical connection with it as a part thereof.

Plaintiffs say that his honor was in error in sustaining the demurrer, because they have alleged that the nuisances complained of were wantonly and negligently created and maintained. As we have seen in the discussion of defendant's appeal, if this is true, the defendant cannot maintain the position that it is "doing a lawful thing in a lawful way"; for it can never be lawful to use or exercise any power or right in a wanton and negligent way, and for any damage inflicted thereby a right of action accrues to the injured party. It becomes, therefore, necessary to ascertain whether the conduct complained of is so characterized by plaintiffs. It is undoubtedly true that plaintiffs allege that defendant has "wantonly and negligently created, maintained, and permitted on their premises, adjoining and contiguous to plaintiffs' said land, such nuisances," etc. If the allegation had ended there, it is clear that the defendant could have successfully interposed a demurrer, or at least demanded that the plaintiffs specify the matters and things which they claimed constituted a nuisance. A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done or omitted to be done, by which the court can see that there has been a breach of duty, is defective and open to demurrer. *Hagins v. Railroad*, 106 N. C. 537, 11 S. E. 590; *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927. The learned counsel well knew this elementary rule

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of pleading, and he therefore, after making the general averment, proceeds to say, "which said nuisances consist in the use of certain side tracks," etc. It will be observed that it is not alleged that the said side tracks were negligently constructed or used. The evident purpose of the plaintiffs was to allege that, by using said side tracks in the manner and for the purposes set forth, the defendant wantonly and negligently created and maintained a nuisance. This theory runs through the complaint in the statement of the cause of action to which his honor sustained the demurrer. It is manifest that, in stating their cause of action in respect to the use of the coal yard, the construction and use of the spur track, trestle, etc., a different theory is advanced. They allege "that, without authority in the charter to engage in such business, defendant held a lot in excess of its right of way, etc., and let the same as a coal and wood yard. They next allege that upon said lot defendant negligently maintained a trestle; that upon two occasions coal cars were negligently forced over the end of said trestle; that they were negligently permitted to remain in such position; that on another occasion the fast mail train negligently ran into said spur track and collided with locomotives. It will be noted that, in respect to each and every act specified as constituting the nuisance connected with the erection and use of the spur track, negligence is specifically alleged. We are brought to the conclusion that, by a proper construction of the complaint in respect to the first cause of action, the plaintiffs have alleged and intended to allege that, by using the side tracks in the manner and for the purposes set forth, the defendant wantonly and negligently created and maintained a nuisance, or, to express the thought in different form, that the use of tracks for the purpose set out constitutes as a matter of law a wanton and negligent nuisance. While pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability. The cases bearing upon the subject are collected in Clark's Code, p. 194, § 233.

Considered from this point of view, the appeal presents a question the solution of which is of great importance to the citizens and railroads of this state. It is not of first impression, having been frequently discussed and decided in other jurisdictions. Chief Justice Beasley, in *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164, says: "If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to plaintiffs' property, so it must be as to all property in its vicinity. It is not only those who are greatly damnified by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damnified at all. * * * The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as

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private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested." He proceeds to show that if such actions may be maintained, it would be impracticable to operate railroads. In the case of *B. & P. R. R. v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, upon the authority of which we held defendant liable on its appeal, Field, J., drawing the distinction, says: "Undoubtedly a railway over the public highways * * * may be authorized, * * * and if, when used with reasonable care, it produces only that incidental inconveniences which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience, in such case, must be suffered for the public accommodation." The principle is well stated by Pollick in his work on Torts (page 128): "A person dwelling near a railway constructed under the authority of Parliament for the purpose of being worked by locomotive engines cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it; nor of damages caused by the escape of sparks from the engines, if the company has used due caution to prevent such escape as far as practicable. * * * If an authorized railway comes near my house, and disturbs me by the noise and vibration of the trains, it may be a hardship to me; but it is no wrong. For the railway was authorized and made in order that trains might be run upon it, and without noise and vibration trains cannot be run at all." The principle is illustrated by the maxim that "no action can be maintained for loss or inconvenience of an authorized thing done in an authorized way."

The question involved in this appeal is very clearly stated and discussed in *Atchison & R. Railroad v. Armstrong* (Kan.) 80 Pac. 978, and the conclusion reached "that, the company having been specifically authorized to make the alleged improvement in its roadbed, in the absence of any charge that it was unnecessary or unskillfully done or made at a place not authorized, it is not liable for damages as for the maintenance of a nuisance." The court thus states the reason upon which the law is founded: "The damages alleged to have been sustained in this case are purely incidental, and arise from a proper operation of the defendant's locomotive engines. Railroad companies are public corporations, organized and maintained for public purposes. Railroads cannot be operated without causing more or less inconvenience to the public, and discomfort and possible damage to persons living adjacent to their lines. All such inconveniences and incidental damages must be endured by the individual for the public good." In *Carroll v. Wisconsin Cent. R. R.*, 40 Minn. 168, 41 N. W. 661, the same conclusion is reached; the court

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saying: "Railroads are a public necessity. They are always constructed under authority of law. They bring to the public great benefits. Operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossing of roads, streets, and the like. One person may suffer more from these than another. * * * But the difference is only in degree and not in kind. * * * If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible." *Parrot v. Cin., H. & D. R. R.*, 10 Ohio St. 627. The question underwent a thorough investigation in *Fisher v. Railroad*, 102 Va. 363, 46 S. E. 381, and the conclusion reached, with the authorities upon which it is sustained, are cited and discussed by Keith, P. In *Jones v. Railroad Co.*, 151 Pa. 30 (47), 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. Rep. 722, Williams, J., says: "The business authorized by the charter of a railroad corporation is the carriage of persons and goods. The work of construction is provided for as an indispensable preliminary, * * * but in the operation of its road a company is liable only for negligence or malice. Smoke, dust, and noise are the usual, and, in the present state of knowledge on the subject, the necessary, consequence of the use of steam and the movement of trains, just as noise and dust are the consequences of the movement of drays and cars over an ordinary highway. The resulting inconvenience and discomfort are in both cases, *damnum absque injuria*." *Romer v. St. Paul City Ry. Co.*, 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455. In *Bates v. Holbrook*, 171 N. Y. 460, 64 N. E. 181, Bartlett, J., says: "Damages which are inflicted upon abutting property owners in the performance of public works, reasonably and properly conducted, are regarded as *damnum absque injuria*. This exemption rests upon the necessity of the situation and commends itself to all reasonable minds." For an able and exhaustive discussion of the question see *Austin v. Augusta Term. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. To the same conclusion the authors of the text-books have arrived. Baldwin, Am. R. R. Law, 28. Judge Elliott says: "A railroad company, authorized by the Legislature to construct and operate a road for the public use, is thereby relieved from many of the consequences attending the construction and operation of a road by an individual without such authority, and it may, perhaps, be stated as a general rule that, so long as it keeps within the scope of the powers and authority granted, a railroad company is not liable, either civilly or criminally, for a nuisance, which is the necessary result of the construction and operation of its road in accordance with its charter." Elliott on Railroads, § 718; 21 Am. & Eng. Enc. 737; *Railway Co. v. Truman*, L. R. 11 App. Cases (1886) 49; *Adams v. Railroad*, 110 N. C. 325, 14 S. E. 857.

While not directly in point, the principle upon which defendant claims immunity from liability is recognized by this court in

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several cases. In *Morgan v. Railroad*, 98 N. C. 247, 3 S. E. 506, the action was for frightening plaintiff's horse. Merrimon, J., said: "The defendant certainly had the right on its roadway to move its locomotives, with or without cars attached to them, in the orderly course of such work, to and fro in making up its trains, etc. The noises ordinarily—naturally—incident to this work, when done, when it may be lawfully done, do not constitute negligence or nuisance. * * * Harm thus sustained is *damnum absque injuria*." *Harrell v. Railroad*, 110 N. C. 215, 14 S. E. 687. In *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27, the same principle is announced. It will be observed that plaintiffs do not allege that defendant has exceeded its right of way. The complaint is that it has used its side track as a hostelry for the engines of the Durham & Northern Division of defendant. We may take notice of the fact that the Durham & Northern is a short branch line, and but few engines can be used on it. We cannot see that the use by defendant of its side tracks for the purpose stated is unreasonable. It is said they are kept there at night and on Sundays, and cleaned, fired, and steamed, without any roundhouse inclosing or covering the same. We cannot see anything unreasonable or negligent in so using and handling the engines. There is no suggestion that by carelessness, or want of due care and caution, any other or different noises are made than is usual or necessary in caring for the engines and preparing them for use. It is said that no smokestack is provided of sufficient size to carry off the smoke, dust, etc., above the surrounding property. There is no suggestion that the smokestacks attached to the engines are not such as are generally in use. It would hardly be insisted that a railroad company is required to erect and maintain a roundhouse at every station where a short branch or feeder makes connection with it. There is no allegation that it is usual to do so. We are not able to say, as a matter of law, that defendant should have a roundhouse or smokestack sufficient to carry the smoke beyond the adjoining property. It may be that if, to protect plaintiffs' property from dust, smoke, and cinders, a way was provided to cast them upon the premises of others, not so near the track, a liability to them would be incurred. Plaintiffs say that from the engines so placed, tended, and handled they were annoyed by the ringing of bells, blowing of whistles, smoke, cinders, etc. These are all, as we know from observation and experience, the usual, ordinary, and to a certain extent necessary, concomitants of using and operating locomotive engines. To subject the company to actions for damages for them would be to practically render them useless. While the law will afford a remedy for damage sustained by the negligent or unreasonable use of these powerful agencies of industrial life and progress, to impose unreasonable restrictions would be unwise. In public agencies is being asserted and sustained by the courts, by this day, when almost unlimited legislative control over these the requirement of larger facilities and greater security for travel and transportation by double tracks, union depots, block systems,

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and many other modern devices, it would seriously interfere with such control to put new and unreasonable restrictions upon their mode of operation. Again, this and all other courts have imposed upon railroads very stringent rules requiring them to give warning of the movement of their engines by ringing bells, sounding whistles, etc. Failure in this respect, followed by injury to persons upon the track, results in large verdicts for damages. The law must be reasonable and just. It would be neither if, for meeting its demands on the one hand, it subjected the corporation to actions for nuisances on the other. The slightest reflection will show the wisdom of the law in this respect.

We have treated the plaintiffs' complaint as in an action for a nuisance, and not for compensation demanded by reason of a constructive "taking" of his property. We would not be understood as abating in any degree the fundamental principle of law that, no matter how urgent the demands of the public may be or how necessary to the progress of its country, no man's property may be taken without compensation. In those cases wherein the right is asserted to flood lands, or otherwise appropriate or subject them to an additional burden, the question of negligence is not involved. Courts uniformly hold that where the action is for damages, by way of compensation which, when paid, secures an easement, the owner of the property is entitled to recover. In *Staton v. Railroad*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838, the injury for which compensation was sought was, as said by Shepherd, C. J., equivalent to a "taking" and an appropriation; hence the question of negligence was not presented. This theory was adopted in *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, and *Parker v. Railroad*, 119 N. C. 677, 25 S. E. 722. Douglas, J., in *Beach v. Railroad*, 120 N. C. 498, 26 S. E. 703, *Lassiter v. Railroad*, 126 N. C. 509, 36 S. E. 48, and *Gerr v. Water Co.*, 127 N. C. 349, 37 S. E. 474, says that in such cases permanent damages should be assessed, and, when paid, the defendant acquires an easement to so use the lands. This must in the nature of the case be so. There is no statutory mode prescribed for a railroad to acquire an easement by condemnation to flow water over adjoining lands. The necessity to do so, to protect and render safe its roadbed, is apparent; hence the courts will not enjoin the company. *Railway Co. v. Mining Co.*, 112 N. C. 661, 17 S. E. 77; *Merrick v. Railroad*, 118 N. C. 1082, 24 S. E. 667. As said by Judge Douglas, the defendant cannot, by law, acquire a right to continue a legal trespass, by paying damages; hence the law permits the acquisition of the easement, in such cases, by the payment of permanent damages, the judgment having that effect. *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954. It is manifest that no easement can be acquired to emit smoke, cinders, make noises, causing vibrations, etc. Beasley, C. J., says: "The laws, in providing for the acquisition and condemnation of lands, authorize the taking of such lands only as are requisite for the necessary structures of the road and the accommodation of its business, and require the payment of

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damages only to that class of landowners. These corporations are not permitted to sequester any other property, nor to compensate for other damages. The central idea of the system is that for incidental damages these companies are not responsible." When it is said that in contemplation of the law there is no wrong without a remedy, it must be noted that the term "wrong" has a legal signification distinct from "damage," and is synonymous with "injuria," signifying a legal injury; hence the maxim "damnum absque injuria," which "is used to designate damage which is not occasioned by anything which the law esteems an injury." Am. & Eng. Enc. 694.

The same argument which is made to sustain this action may, with equal force, be made in every case wherein this maxim is invoked. It is an illustration of the truth that the law is not a system of logical or of ethical perfection, but a practical science, and that almost all of its general principles, however wide their application may seem to be, have on all sides their reasonable limitations. The value of property is constantly being affected by the conduct of adjoining owners. Changes in the value of property in towns and cities are constantly being made by the demands of trade, manufacturing, channels of travel, and many other causes. So long as they are done within legal rights and without negligence, there is "damage," but no injury, therefore no action. Of course, if the business engaged in is per se wrongful, hurtful to health, or otherwise destructive of legal rights, another maxim of the law, "Sic utere tuo ut allenum non leadus" applies. Without further pursuing the interesting question involved, we find, upon principle and in the light of the authorities, no error in his honor's ruling sustaining demurrer.

The judgment must be affirmed.

SMITH, et al., v. CLEVELAND, C. C. & ST. L. RY. CO.

(Supreme Court of Indiana, May 28, 1907.)

[81 N. E. Rep. 501.]

Railroads—Consolidation—Power to Consolidate—Statutes.—Under the express provisions of Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), a railroad company organized in this state may consolidate with another organized in an adjoining state.

Same—Application of Statute.—Under the express provisions of Acts 1853, p. 107, c. 86 (Burns' Ann. St. 1901, § 5262), the right of consolidation so provided applies to railroads organized after, as well as before, the enactment of the statute.

Same—Recording Copy of Resolution of Directors.—Burns' Ann. St. 1901, § 5252, providing that, whenever two or more railroad companies unite under a common name, they shall, upon its adoption, cause a copy of the resolutions of their boards of directors to be recorded in recorders' offices of the different counties through which

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the road may run, relates only to the union of two roads under a common name for the purpose of operation within the state, and not to a consolidation and merger of the capital stock of companies.

Same—Power to Consolidate—Prior Consolidation.—A railroad company is not precluded from consolidating with another company under Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), providing for the consolidation of a railroad company with another company organized in an adjoining state, by the fact that it was the product of a prior consolidation, since the power of consolidation conferred is not exhausted by a single exercise.

Same.—The fact that Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), speaks of the making of one joint-stock company of the "two" roads thus connected, does not prevent the consolidation of more than two roads, since, as a consolidated company may reconsolidate, it would make no substantial difference whether the consolidation was accomplished by successive acts or by one concurrent agreement.

Same—Intersecting Roads.—The purpose of Burns' Ann. St. 1901, § 5215, providing that a railroad may not consolidate with any railroad built, equipped, or operated within the state which may cross or intersect its line, was to prevent the absorption of competing lines, and it does not apply where the contiguity or intersection is at a terminal point of the road consolidated.

Same—Effect of Consolidation.—The consolidation of two or more railroad corporations pursuant to the laws of different states results in the formation of one corporation, which is regarded as a domestic corporation in each of the states whose laws are followed in effecting the consolidation.

Same—Rights and Liabilities of Resultant Corporation.*—In the absence of restrictions, authority to consolidate confers upon the resultant corporation all the powers, franchises, rights, obligation, and duties of the constituent companies.

Eminent Domain—Delegation of Power to Private Corporation—Power of Consolidated Railroad.*—A consolidated railroad company has a right to exercise the power of eminent domain, if the constituent companies had that power.

Same—Particular Purposes—Railroads—Elimination of Grades.—Acts 1903, p. 218, c. 121, provides that, "if at any time after the location of the line of any railroad * * * it may appear to the directors * * * that the line thereof is * * * inconvenient or expensive to operate by reason of * * * grades, * * * such directors may make local alteration of the line," and may take possession of the lands embraced in the new location necessary for the construction of the altered line. Held, that improvements consisting of widening and raising an embankment to eliminate a grade were local in character and authorized by the act.

*For the authorities in this series on the subject of the effect of consolidation on the rights and liabilities of railroad companies, see foot-notes appended to *Commonwealth v. Buffalo, R. & P. Ry. Co.* (Pa.), 10 R. R. R. 160, 33 Am. & Eng. R. Cas., N. S., 160; *Union Traction Co. v. Basey* (Ind.), 14 R. R. R. 455, 37 Am. & Eng. R. Cas., N. S., 455.

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Same.—Under the express provisions of Burns' Ann. St. 1901, § 5153, cl. 4, a railroad is empowered for the purposes of cuttings, embankments, etc., to take as much land as may be necessary within the limits of its charter in excess of the six rods ordinarily allowed for right of way.

Same.—The fact that the predecessor of a railroad company had appropriated land for an embankment or fill on certain premises did not debar the present company from appropriating additional lands for the purpose of raising such embankment.

Same—Right of De Facto Corporation.—A de facto corporation may exercise the power of eminent domain.

Corporation—Corporate Existence—Collateral Attack.—Where the evidence showed a substantial, if not a literal, compliance with the law authorizing consolidation of railroads, resulting in the corporate existence of a railroad seeking to condemn land, and it had exercised the rights and functions of a railroad corporation continuously for about 17 years, its corporate existence was so far de jure as to repel the collateral attack of the defendant.

Same.—Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), providing for the consolidation of railroads, allows the consolidation to be made "upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining state with whose road or roads connections are thus formed." Held that, where a consolidation was made with special reference and in conformity with the laws of another state, irregularities as to amount of capital stock issued per mile, composition of board of directors, etc., being matters not wholly governed by the laws of this state, could not be inquired into collaterally.

Eminent Domain—Proceedings—Maps and Profiles—Filing Copies.—In proceedings by a railroad to condemn land incident to a change in its line, the filing in the office of the clerk of the circuit court of a blueprint of the map and profile of the purposed change, and of the certificate thereto subscribed by a majority of the board of directors, instead of the original, was not a substantial defect, where the map, profile, and certificate were shown to be authentic and correct.

Same—Preliminary Hearing—Issues.—Upon a preliminary hearing in condemnation proceedings, the only issues allowable are such as go to defeat or abate the asserted right to exercise the power of eminent domain.

Same—Statutory Provisions—Right to Appeal.—It is no ground for attack upon Acts 1905, p. 59, c. 48, providing for the exercise of eminent domain, that the act authorizes the taking of possession before the matters in controversy are settled on appeal, since the right to an appeal is not an inherent right, but may be granted or withheld at the pleasure of the Legislature.

Same—Proceedings—Preliminary Hearing—Pleadings.—Upon the preliminary hearing in a proceeding by a consolidated railroad company to condemn land, interrogatories to be answered by the railroad, relating to various facts occurring subsequent to the act of consolidation, were properly stricken out, since the statute provides that no

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pleadings other than the complaint and written objections thereto, filed by the defendant, shall be allowed.

Appeal from Circuit Court, Hendricks County; Thos. J. Cofer, Judge.

Proceedings by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against Alvah B. Smith and others to condemn a right of way. From an interlocutory order appointing appraisers, defendants appeal. Affirmed.

George W. Brill, George C. Harvey, and Saml. Ashby, for appellants.

L. J. Hackney, F. L. Littleton, and James L. Clark, for appellee.

MONTGOMERY, J. This is an appeal from an interlocutory order appointing appraisers in a proceeding by appellee to condemn and appropriate lands for the purpose of making local alterations and raising the grade of the line of its railroad in Hendricks county, under the statutes enacted by the Legislature of 1905 (Acts 1905, p. 59, c. 48). The complaint alleged that appellee is a corporation organized under the laws of this state authorizing the organization, construction and operation of steam railways, and is the owner and engaged in operating a line of railroad from the city of Indianapolis, through Hendricks county, to the city of St. Louis, in the state of Missouri; that appellee's line of railroad through appellant's real estate in said county is unnecessarily inconvenient and expensive to operate by reason of unavoidable curves, grades, and other causes, and will be greatly improved by straightening curves, reducing grades, raising bridges and fills, deepening cuts, and making additional tracks; that appellee's board of directors has determined that such local alterations are necessary, and resolved to make the same, and has adopted a map and profile of the proposed changes, and has caused the same to be filed in the office of the clerk of the Hendricks circuit court; that appellant, Alvah B. Smith, is the owner of the real estate and rights particularly described to be appropriated; that the condemnation and appropriation of said lands is necessary for appellee's use in making said changes and alterations, and its use is necessary in widening the base and raising the fill for appellee's tracks at said point; that before commencing this proceeding appellee made an effort to purchase said lands of appellant, Alvah B. Smith, but failed to agree with him for the purchase of the same for the purposes aforesaid, and has been and is now unable to agree with him for such purchase. Appellant filed 26 objections to the complaint, of which those numbered from 8 to 25, inclusive, were stricken out upon appellee's motion. The cause was heard by the court upon the complaint and appellant's objection numbered 1, 2, 3, 4, 5, 6, 7, and 26, and a finding made to the effect that the complaint is true, and none of such objections well taken, and thereupon appraisers were appointed.

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It is charged upon this appeal that the court below erred in striking out each of appellant's objections numbered from 8 to 25, inclusive; in striking out interrogatories propounded by appellant to be answered by appellee numbered from 1 to 22, inclusive; in refusing to require appellee to produce books and papers as called for in appellant's application therefor by specifications numbered 2 to 12, inclusive; in overruling appellant's objections to the complaint numbered 1, 2, 3, 4, 5, 6, 7, and 26, and in holding that appellee had the right to condemn the tracts of land described in the amended complaint; in appointing appraisers, in admitting in evidence over objection appellee's exhibits 2, 4, 5, 6, 7, 8, 9, and 10; in permitting witnesses to answer certain questions over appellant's objection; and, finally, that the order appointing appraisers is not sustained by sufficient evidence and is contrary to law. Appellant's objections to the complaint averred that (1) the court had no jurisdiction of the subject-matter or of the person of appellant; that appellee had no right to exercise the power of eminent domain (2) for the use sought, or (3) for any use or purpose; (4) that appellee is not a railroad corporation duly organized under the laws of this state; (6, 7) that before the filing of the complaint appellee had not made a map and profile of the route intended to be adopted, and caused the same to be certified by a majority of its board of directors and filed in the office of the clerk of the Hendricks circuit court; and (26) that the complaint does not state facts sufficient to constitute a cause of action and to entitle appellee to exercise the power of eminent domain for the use sought, and entitle to it to the relief prayed. In presenting the questions for consideration to this court, appellant's counsel have grouped in one class the alleged errors in overruling appellant's objections to the complaint in holding the evidence sufficient to authorize appellee to condemn and appropriate the property involved, and in making the interlocutory order appointing appraisers. For convenience we will follow substantially the order thus adopted in argument.

Appellant's counsel correctly state propositions of law to the effect that corporations are creatures of statute, with no powers except those conferred by law; that the right to exercise the power of eminent domain is a sovereign power of the state, which may be exercised only by a person or corporation to whom it has been expressly granted, and for a public use, and that such grants are strictly construed. It appears from the evidence that in the year 1868 the Cleveland, Columbus & Cincinnati Railroad Company and the Bellefontaine Railroad Company were consolidated under a law of the state of Ohio, passed March 30, 1851, and took the name of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company; the line of such consolidated company extending from Cleveland to Indianapolis. Articles of incorporation for the Indianapolis & St. Louis Railroad Company were filed in the office of the Secretary of State of Indiana on the 31st day of August, 1867.

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This road was constructed and extended from Indianapolis to the state line at Terre Haute. The road was sold upon a decree of foreclosure to E. B. Thomas, and he, with 15 others, formed a railroad corporation in pursuance of the act of March 3, 1865 (Acts 1865, p. 66, c. 20; sections 5209-5215, Burns' Ann. St. 1901), taking the name of the Indianapolis & St. Louis Railway Company. This company and the consolidated company above named on the 19th of March, 1889, entered into an agreement of consolidation with the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, an Indian corporation, whose line of railroad extended from Cincinnati to Lafayette whereby the appellee was formed under the name of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. This agreement of consolidation was filed in the office of the Secretary of State of the state of Ohio June 7, 1889, and in the office of the Secretary of State of the state of Indiana June 8, 1889. The right of a railroad company organized in this state to consolidate with another organized in an adjoining state was given by the following statute: "Any railroad company heretofore organized under the general or special laws of this state shall have the power to intersect, join, and unite its railroad with any other railroad constructed or in progress of construction in this state or in any adjoining state, at such point on the state line or at any other point as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint-stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed: Provided, their charters authorize said railroads to go to the state line or to such point of intersection." Acts 1853, p. 105, c. 85 (section 1971, Rev. St. 1881). The right of consolidation so given applies to railroads organized after, as well as before, the enactment of the original statute. Acts 1853, p. 107, c. 86 (section 5262, Burns' Am. St. 1901).

The statutes of Ohio under which these consolidations were effected read as follows:

"Sec. 3379. When the lines of road of any railroad companies in this state, or any portion of such lines, have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously, without break or interruption, such companies may consolidate themselves into a single company.

"Sec. 3380. A company organized in this state for the purpose of constructing, owning and operating a line of railway, or whose line of road is made or is in process of construction, to the boundary line of the state, or to any point either in or out of the state, may consolidate its capital stock with the capital stock of any company in an adjoining state, organized for a like purpose, and whose line of road has been projected, constructed or is in process of construction to the same point

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where the several roads so united and constructed will form a continuous line for the passage of cars; and roads running or to be constructed to the bank of a river which is not bridged, shall be held to be continuous under this section.

“Sec. 3381. The consolidation shall be made under the conditions and restrictions following: (1) The directors of the several companies may enter into a joint agreement, under the corporate seal of each company, for the consolidation of the companies, and prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new company, the number of directors and other officers thereof and their places of residence, the amount of the capital stock of the new company agreed upon, the number of shares of capital stock, the amount of each share, and the amount of converting the capital stock of each of the constituent companies into that of the new company, with such other details as they may deem necessary to perfect the new organization and the consolidation of the companies. (2) The agreement shall be submitted to the stockholders of each of the companies, at a meeting thereof called separately for the purpose of taking the same into consideration, due notice of the time and place of holding such meeting and the object thereof shall be given by written or printed notices addressed to each of the persons in whose names the capital stock of the companies stand on the books thereof, and also by a like notice published in some newspaper in the city or town where such company has its principal office or place of business: Provided, that in case all the stockholders are present at such meeting, in person or by proxy, such notice may be waived in writing. At the meeting of the stockholders, the agreement of the directors shall be considered, and a vote by ballot taken for the adoption or rejection of the same; each share of stock on which has been paid all the installments called for by the board of directors, entitling the holder thereof to one vote; the ballots shall be cast in person or by proxy, but if two-thirds of all the votes cast at the meeting be for the adoption of the agreement, that fact shall be certified thereon by the secretary of each of the companies, and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the Secretary of State. And all consolidation agreements heretofore entered into and ratified by such companies, substantially in manner as in this section prescribed, shall be as valid as if entered into and ratified by virtue of this section.

“Sec. 3382. When the agreement is made and perfected, as provided in the preceding section, and the same or a copy thereof filed with the Secretary of State, the several companies parties thereto shall be deemed and taken to be one company possessing within this state, all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties, of a railroad company.

“Sec. 3383. The stockholders at the meeting called to take into consideration the agreement, shall, after the adoption of

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the same, appoint a time and place for the election of the directors and other officers of the new company, notice of which shall be given by the secretary of each of the companies in some newspaper printed or of general circulation, at the place of the principal office of each company, at least three weeks previous thereto: Provided that if at such meeting all the stockholders of the constituent companies are present, either in person or by proxy, they may, in writing or by resolution waive such notice, and consent to hold such meeting and election at any time which election shall be conducted in such manner as may be prescribed by the stockholders at such meeting.

“Sec. 3384. Upon the election of the first board of directors of the company created by the agreement of consolidation, all and singular the rights, privileges and franchises of each of the companies to the agreement, and all the property, real, personal, and mixed, and debts due on account of subscriptions of stock, or other things in action, shall be deemed to be transferred to and vested in such new company, without further act or deed; all property, rights of way and other interest, shall be as effectually the property of the new company as they were of the companies parties to the agreement; the title to real estate, either by deed, gift, grant or by appropriations under the laws of this state, shall not be deemed to revert or be impaired by reason of the consolidation; but all rights of creditors and all liens upon the property of either of such companies, shall be preserved unimpaired, and the respective companies, may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies, shall thenceforth attach to the new company and be enforced against it to the same extent as if such debts, liabilities and duties had been contracted by it.

“Sec. 3385. The new company shall, as soon as convenient, after the consolidation, establish a principal office, at some point in this state on the line of its road, and may change the same at pleasure; but public notice of such establishment or change shall be given in some newspaper.

“Sec. 3386. Suits may be brought and maintained against the new company in the courts of this state, for all causes of action, in the same manner as against other companies.”

“Sec. 3391. A copy of the agreement and act of consolidation duly certified by the Secretary of State, shall be received in the courts of this state as prima facie evidence of the existence of the several companies parties to the agreement prior to and at the time of the execution of the agreement, of the consolidation of the companies as specified in the agreement, that such consolidation was authorized by the laws of the several states within which the several companies were chartered, and into which the consolidation road extends, and of all and singular the facts, statements and covenants set forth and received in the agreement and act of consolidation and in the certificates endorsed thereon.

“Sec. 3392. It shall not be necessary to produce or prove the

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charters of the companies parties to such consolidation, the laws of the several states under and by virtues of which such consolidation was effected, or the original articles of consolidation, in any suit brought to charge such consolidated company with any liability of either of the companies parties to the act of consolidation, any law or custom to the contrary notwithstanding." Rev. St. Ohio 1880.

It is insisted that appellee has no legal corporate existence, for the reason that a copy of the resolution authorizing consolidation was not filed in the office of the recorder of each county through which the road extends, as required by section 5252, Burns' Ann. St. 1901. This provision relates only to the union of two roads under a common name for the purposes of operation within this state, and not to a consolidation and merger of the capital stock of the companies. The filing of the agreement of consolidation in the office of the Secretary of State, as directed by the Ohio statute, was certainly all that was required of consolidating companies. *Chicago, etc., R. Co. v. State*, 153 Ind. 134, 51 N. E. 924; *Leavensworth County v. Chicago, etc., R. Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; *Trester v. Missouri, etc., R. Co.*, 33 Neb. 171, 49 N. W. 1110.

It is further argued that one of the constituent companies out of which appellee was created, being the product of a prior consolidation, was not authorized to enter into a second agreement of consolidation. This proposition is not tenable. By the terms of the statute the consolidation effected a complete merger of the stock of the constituent companies, thereby making "one joint-stock company." This new company thus created came as clearly within the provisions of the statute as if organized by article of incorporation. The power of consolidation conferred by the statute is not exhausted by a single exercise. *Jones v. Missouri, etc., Co. et al. (C. C.)* 135 Fed. 153. The statute speaks of the making of one joint-stock company of the "two" roads thus connected, and from this expression it is contended that an agreement of consolidation made by three corporations is unauthorized and void. The right to enter into more than one consolidation disposes of this contention. It could make no substantial difference whether the consolidation by which appellee was formed was accomplished by successive acts or by one concurrent agreement. If the procedure for consolidation were conceded to be irregular, it would not make the result void. Section 5258, Burns' Ann. St. 1901, impliedly concedes the right of more than two parties to enter into an agreement of consolidation.

It is next contended that the railroad act of 1865 prohibited a company organized in pursuance of its provisions from consolidating with another company whose road intersected or crossed its road, and which had theretofore been constructed and operated; that the Indianapolis & St. Louis Railway Company was organized under that act; that its road was intersected at Indianapolis by the other two roads, which were fully constructed and in operation at the time of consolidation, and therefore that it

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was forbidden to consolidate with such companies. The act in question conferred upon corporations formed thereunder all the powers, rights, privileges, immunities, and franchises in respect to the road so purchased that were possessed or enjoyed by the corporation that owned or held such railroad previous to the sale. Section 5211, Burns' Ann. St. 1901. It was further provided that any such corporation should have "power to consolidate with other railroad corporations in the continuous line, within or without this state, upon such terms as may be agreed upon by the corporations owning the same." Section 5215, Burns' Ann. St. 1901. The manifest purpose of the provision prohibiting consolidation was to prevent the absorption of competing lines. In our opinion the contiguity of intersection at a terminal point of the roads consolidated did not come within the prohibition of the statute, but that the consolidated lines were so far continuous as to fall within the authority to consolidate authorized by this act. The consolidation of two or more corporations pursuant to the laws of different states results in the formation of one corporation, which is regarded as a domestic corporation in each of the states whose laws are followed in effecting such consolidation. *Eaton, etc., R. Co. v. Hunt*, 20 Ind. 457; 2 *Elliott on Railroads*, § 339; 3 *Wood on Railroads*, § 487 (Ed. 1894); 3 *Cook on Corporations*, § 910; 3 *Purdy's Beach on Corporations*, § 1278; *Taylor or Private Corporations*, § 406 (4th Ed.); 10 *Cyc.* 294; *Ohio, etc., Ry. Co. v. People*, 123 Ill. 467, 14 N. E. 874; *Angier v. East Tennessee, etc., Ry. Co.*, 74 Ga. 634; *Day v. New Orleans, etc., Ry. Co.*, 37 La. Ann. 131; *In re St. Paul R. Co.*, 36 Minn. 85, 30 N. W. 432; *State v. Keokuk, etc., Ry. Co.*, 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222; *Trester v. Missouri, etc., Ry. Co.*, 33 Neb. 171, 49 N. W. 1110; *Sage v. Lake Shore, etc., Ry. Co.*, 70 N. Y. 220; *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721; *Com. v. Atlantic, etc., Ry. Co.*, 53 Pa. 9; *In re Trenton Street Ry. Co.* (N. J. Ch.) 47 Atl. 819; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *St. Louis, etc., Ry. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Burger v. Grand Rapids, etc., R. Co.* (C. C.) 22 Fed. 561; *Paul v. Baltimore, etc., R. Co.* (C. C.) 44 Fed. 513; *Fitzgerald v. Missouri, etc., Ry. Co. et al.* (C. C.) 45 Fed. 812; *Missouri, etc., Ry. Co. v. Meeh*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; *Winn et al. v. Wabash R. Co.* (C. C.) 118 Fed. 55. In the absence of restrictions, authority to consolidate confers upon the resultant corporation all the powers, franchises, rights, obligations, and duties of the constituent companies, *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 654; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 49; *Scott v. Hansheer*, 94 Ind. 1; *Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. 560; *Cleveland, etc., R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367; 3 *Purdy's Beach on Corporations*, § 1283. A consolidated railway company has a right to exercise the power of eminent domain, if the constituent companies had that power, and may prosecute to final judgment condemnation proceedings instituted by one of the constituent com-

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panies before consolidation. *Union Traction Co. v. Basey*, 164 Ind. 249, 73 N. E. 263; *In re Trenton St. Ry. Co.* (N. J. Ch.) 47 Atl. 819; *Trester v. Missouri, etc., R. Co.*, 33 Neb. 171, 49 N. W. 1110.

The contemplated alterations in the line of appellee's road were to be made in pursuance of the following statute: "That section one of an act entitled an act to enable railroads to alter their lines in certain cases, approved December 20, 1865, the same being section 5171 of Burns' Revised Statutes of Indiana, Revision of 1901, be and the same is hereby amended to read as follows. to wit: 'Section 1. If at any time after the location of the line of any railroad, chartered by this state, and the filing of the map thereof, it shall appear to the directors of such company that the line thereof is unnecessarily dangerous, inconvenient or expensive to operate, by reason of unavoidable causes, grades or serious errors in location, such directors may make local alteration of the line, and cause a new map to be filed in the office where the map showing the first location is filed, and may thereupon take possession of the lands embraced in such new location which may be necessary for the construction and maintenance of such road on such altered line, either by agreement of the owner or by such proceedings as are authorized by the charter of such company, and may use such new line in place of the one for which it is substituted. But nothing in this act shall be so construed as to confer upon such railroad company any power to locate its road on any route which would not have been authorized by its charter; and nothing in this act contained shall authorize such company to make a location of its track within any city without the consent of the common council of such city, nor to change its road so as to avoid any point named in its charter: Provided, further, that in all cases where any railroad company has heretofore, or may hereafter, make any such alterations as are provided for in this act the board of county commissioners of the county in which such alterations are made may locate a public highway on the old line or route of such railroad for which such new line is substituted, by the same proceedings and on the same terms as public highways are now, or may be hereafter, located.'" Acts 1903, p. 218, c. 121.

Appellant's counsel contend that the improvements planned by appellee as disclosed by the evidence are not local, but general, in character; and for that reason the appropriation of appellant's land should be denied. The lands sought to be taken in this proceeding are for the purpose of widening and raising the embankment and thereby eliminating a grade in the road. This particular taking is manifestly for a local improvement, and clearly authorized both by the act of 1903 and by appellee's general charter powers. Railroad companies are not authorized to lay out their roads in general exceeding six rods wide, but, for the purpose of "cuttings, embankments and procuring stone and gravel," they may take as much more lands, within the limits of their charter, as may be necessary for the proper construction

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and security of the roads. Clause 4, § 5153, Burns' Ann. St. 1901; Elliott on Railroads, 973. The circumstance that appellee's predecessor has heretofore appropriated a strip of land from 100 to 110 feet in width for the purpose of constructing a fill or embankment upon the tract now owned by appellant does not debar appellee from appropriating lands to an additional width for the purpose of raising such embankment so as to make it answer the present requirements of the company's needs. *Peck v. Louisville, etc., Ry. Co.*, 101 Ind. 366, 371; *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16, 42.

It is earnestly insisted by appellant's counsel that the appellee is shown to be, at best, only a de facto railroad corporation, and that as such it is without authority to exercise the power of eminent domain. If it be conceded that the proceedings to consolidate in question were in any respect irregular, yet the result would be to constitute appellee a de facto corporation. *Bradford v. Frankfort, etc., R. Co.*, 142 Ind. 383, 393, 40 N. E. 741, 41 N. E. 819; *In re Trenton St. Ry. Co.* (N. J. Ch.) 47 Atl. 819. The insistence that a de facto railroad corporation has no right to exercise the power of eminent domain cannot be sustained. This court has recently declared the contrary doctrine, and upon a re-examination of the question we are satisfied that our decision is in accord with the greater weight of authority, and now reaffirm that holding. *Morrison v. Indianapolis, etc., R. Co.* (Ind. Sup.) 76 N. E. 961, and cases cited. The evidence shows a substantial, if not a literal, compliance with the law authorizing consolidation of railroads resulting in the corporate existence of appellee, and that for about 17 years it has continuously exercised the rights and functions of a railroad corporation as a common carrier of freight and passengers. The corporate existence of appellee is so far de jure as to repeal the attack of appellant. *Marian Bond Co. v. Rubber Co.*, 160 Ind. 558, 65 N. E. 748; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *Atchison, etc., R. Co. v. Board, etc.*, 51 Kan. 617, 33 Pac. 312; *Pape v. Bank, etc.*, 20 Kan. 440, 27 Am. Rep. 183; *City of St. Louis v. Shields*, 62 Mo. 247; *Cooley, Const. Lim.* 254. The statute under which this consolidation was effected provided that such consolidation might be made "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed." The consolidation was made with special reference and in conformity to the statutes of Ohio. The objections of appellant with regard to the amount of capital stock issued per mile, the number, term, place of residence, and of meeting of the board of directors are therefore all matters not governed wholly by the laws of this state, and, if confessedly irregular, may be inquired into only by the state in an appropriate proceeding. *Williams v. Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; *Barren Creek Ditch Co. v. Beck*, 99 Ind. 247; *Logan v. Vernon, etc., R. Co.*, 90 Ind. 552; *Brown v. Calumet R. Ry.*

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Co., 125 Ill. 600, 18 N. E. 283; National Docks, etc., R. Co. v. Central R. Co., 32 N. J. Eq. 755; Reisner v. Strong, 24 Kan. 410; Elizabeth City Academy v. Lindsey, 28 N. C. 476, 45 Am. Dec. 500.

Appellee filed in the office of the clerk of the Hendricks circuit court a blueprint of the map and profile of the proposed changes to be made in its road, and of the certificate thereto subscribed by a majority of its board of directors, instead of the original, and this is made the ground of an attack upon this proceeding. The map, profile and certificate were shown to be authentic and correct and binding upon the company, and this objection is without substantial merit.

Objections 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, and 25, stricken out upon appellee's motion, charged that certain meetings of appellee's stockholders and directors were not held within the state; that the proposed change in the road and the map and profile thereof were not authorized; that no law of this state authorized the filing of the agreement of consolidation in the office of the Secretary of State, and that a copy of the resolution of consolidation was not filed with the recorder of each county through which the road passes; that appellee has no right to exercise the power of eminent domain for the reason that the management and ownership of its road is in another corporation, and that a foreign corporation or a de facto corporation cannot exercise such a power in this state; that the present line of road is not unnecessarily inconvenient; that appellee cannot appropriate land exceeding six rods in width, and that no map or profile, but only a blueprint or copy, was filed with the clerk; and that appellee did not make an honest effort to agree with appellant for the purchase of the land which it seeks to condemn. These propositions have been sufficiently disposed of in the preceding part of the opinion. It is apparent that they were in part argumentative denials of facts which appellee must affirm and prove, and in part matters which only the state could plead in a direct proceeding, and which were in no wise sufficient to defeat or abate appellee's right to appropriate the property described in the complaint. The only issues allowable upon this preliminary hearing are such as go to defeat or abate the asserted right to exercise the power of eminent domain. *Vandalia Coal Co. v. Indianapolis, etc., Ry. Co.* (Ind. Sup.) 79 N. E. 1082; *Morrison v. Indianapolis, etc., Ry. Co.* (Ind. Sup.) 76 N. E. 961. It follows that no error was committed in striking out any of these objections.

Objections 15, 16, and 24 averred that the statute of 1905 (Acts 1905, p. 59, c. 48), upon which this proceeding was founded, is unconstitutional, for the reason that section 5 authorizes appellee to take possession of appellant's real estate before the matters in controversy are determined upon appeal, in violation of sections 12, 21, and 24 of article 1 of the Constitution of Indiana, and section 10, art. 1, and section 1, of the fourteenth amendment to the Constitution of the United States.

Smith v. Cleveland, etc., Ry. Co

In *Consumers' Gas, etc., Co. v. Harless*, 131 Ind. 446, 451, 29 N. E. 1062, 1063, 15 L. R. A. 505, this court said: "The right of eminent domain is limited only by the Constitution, and the only limitation in this state is that no man's property shall be taken by law without compensation, nor except in case of the state, without such compensation first assessed and tendered." See, also, *Aurora, etc., R. Co. v. Miller*, 56 Ind. 88. The statute in question does not deny, but seeks to secure, this right, by making ample provision for the assessment, recovery, and payment of all damages before actual possession is taken. A right of appeal is not an inherent right of the citizen, and may be granted or withheld at the pleasure of the legislative department of the state. When the state finds it expedient for the public good to delegate its sovereign authority, and clothe a citizen or creature of the law with such extraordinary power as the right of eminent domain, it would appear impolitic and unseemly that its exercise should be indefinitely stayed during vexatious litigation. The right of appeal from the interlocutory order, the right to an appraisal of damages, and an appeal from such award, and to a trial by jury upon questions connected therewith, and a guaranty of payment before the passing of title afford every requirement of due process of law, and we perceive no plausible reason for the contention that the statute impairs the obligations of a contract or violates any of the constitutional guaranties invoked by appellant. There was clearly no error in rejecting these paragraphs as affirmative pleadings.

Appellant filed 22 interrogatories to be answered by appellee, relating to the number, residence, and place of election of appellee's directors, the names and place of residence of general officers, and various other facts occurring subsequent to the act of consolidation. The interrogatories were stricken out. The preliminary hearing out of which this appeal arises is a special proceeding of a somewhat summary character. The hearing may be had before the judge in vacation, as well as in open court. Pleadings and dilatory motions such as are authorized and appropriate in civil causes are manifestly improper. The statute expressly says that no pleadings other than the complaint and written objections thereto, if any, filed by the defendant, shall be allowed. The issues authorized are to conserve public interests as much as individual rights, and the plaintiff must satisfy the court or judge of its right to exercise the power of eminent domain for the use sought, and of the regularity of the proceedings before proceeding to the assessment of private damages. The interrogatories tendered were not proper and the court rightly rejected them. *Simons v. Simons*, 107 Ind. 197, 198, 8 N. E. 37; *Barr v. Barr*, 31 Ind. 240.

Appellant also filed verified motion to require appellee to produce certain papers and records, as set forth in 12 specifications. The court sustained the motion as to the first and fourth of such items, and overruled it as to the remaining paragraphs. The first related to the articles of association of the Indianapolis

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& St. Louis Railroad Company, and the fourth to the consolidation agreement. These items of evidence were material to the issues, and were properly required, and doubtless would have been produced by appellee without regard to this motion. The other records demanded were in line with the rejected objections and interrogatories filed by appellant, and were not relevant or material, for the reasons and upon the grounds before stated, and the court properly denied such parts of the motion, assuming, without deciding, that the motion itself was allowable.

Appellant's objections to the various items of evidence were upon grounds already considered, and of a technical character. This opinion need not be prolonged, since the rulings announced dispose of all of the remaining questions arising in connection with the admission of the evidence.

There was some controversy in the evidence as to whether a proper effort was made by appellee to purchase of appellant the lands and rights sought to be appropriated. We cannot disturb the finding upon this question.

We find no irregularity or error justifying a disturbance of the result reached by the court below.

The judgment is affirmed.

CITY OF READING v. UNITED TRACTION CO.

(Supreme Court of Pennsylvania, May 14, 1906.)

[64 Atl. Rep. 446.]

Street Railroads—Paving Streets.—The portions of streets occupied by a street railway company must be kept in good condition by it, though there is no express contract or statutory direction to that effect.

Same—Failure to Pave—Action by City.—In an action against a street railway company by a city to recover for paving a portion of a street with asphalt, the city must show that the repairs were necessary, that notice had been given by the city to the defendant to repair the tracks by paving them with asphalt, and that the repairing was reasonable, necessary, and proper.

Appeal from Court of Common Pleas, Berks County.

Action by the city of Reading against the United Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged in part as follows: "Were the spaces between the tracks of the traction company upon the streets that have been referred to here or upon any of them out of repair, so that they required repair, that repairs were at the time necessary? That is the first question which you will have to pass upon. * * * I may say that there are a number of these streets; in fact, there are nine stretches that are spoken of here, as to

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each of which the plaintiff claims that the condition was such as to require repairs at the time, and asks for a verdict covering the amount that was spent by the city upon those stretches. There is Bingham street from Canal to Sixth; there is Eighth street from Chestnut to Penn; there is ninth street from Penn to Washington; there is tenth street from Penn to Washington; there is Eighth street from Penn to Washington; there is Washington from Fourth to Sixth; there is Sixth from Penn to Franklin; there is Fifth from Penn to Walnut; and there is Fifth from Pine to Laurel. There is a separate question arising under the evidence as to each of these, and upon each of them you ought to ask yourselves the question and come to a conclusion under the evidence, according to the fair preponderance of it, as to whether, on that portion or on this portion of the various stretches that are here claimed for, there was a necessity for repair or not. If there were any of these on which there was no such necessity, then you must negative that question as to those. If there were any of them as to which you find that there was a necessity, you will answer the question in the affirmative as to those.

"Then you will come to the next question: Was the defendant company, the United Traction Company, notified by the city to repair those tracks by paving them with asphalt? You will remember, gentlemen, that the city had determined to pave these streets, those portions of them not occupied by the tracks, with asphalt, and, as I have said to you, it is the business, the duty, of the railway company to keep its portion of the streets in good repair in reasonable correspondence with the rest of the street. Now, was the traction company notified by the city to repair those portions of the streets by paving them with asphalt? I may say to you that whether the word 'repair' was used in the notice is not a controlling question. The question is, was the traction company required to do something to those portions of the streets which were occupied by its road for the purpose of putting them in better condition.' Whether the word 'repair' or the word 'repave' was used in the notice is not controlling. Nor is it necessary, of course, that in that notice the company should have been specifically informed by the city that its tracks or the portions between its tracks were out of repair. The railway company had charge of that, and of course knew itself what the condition of its tracks was. The point is, was the railway company given notice that the city wanted it to do something there in the way of correcting evils that existed, and did it have a fair opportunity to do it? As I told you, the city had a right to determine to asphalt the streets, that is to say, its portion of them; and it then became the duty of the railway company, when notified, and if it was a fact that the portions of the street occupied by it were out of repair, to repair them in correspondence with the pavement which the city was putting on these streets. Now, was it necessary, under all the circumstances, and was it proper, that this repairing should be done by way of asphaltting? You have heard what the testimony on that subject is. You have

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heard the testimony of certain experts as to the feasibility, the possibility, the reasonableness, of the one kind of repairing or the other, whether it should be asphalt, whether it should be Belgium blocks, or a combination of both, or vitrified brick, or whether it was feasible and proper, according to approved usages and practices, to make a combination, if you may so call it, of cobblestones or hill stones and asphalt. You have heard the testimony on both sides of this question, and it will be for you to determine whether it was a reasonable thing for the city to pave these streets with asphalt, and would have been a reasonable thing to permit a repair of the spaces between the tracks by retaining the kind of pavement that was there before, or whether it was reasonable, necessary, and proper to substitute in the place of that a repair by asphalt. It will be for you to say, under all the evidence, whether it was a reasonable and proper requirement for the city to put upon this railway company that in repairing that portion of the street which it occupies it should use sheet asphalt also."

Verdict and judgment for plaintiff for \$13,727.85. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

Jefferson Snyder, C. H. Ruhl, J. Milton Miller, and R. L. Jones, for appellant.

Isaac Hiester and William J. Rourke, for appellee.

BROWN, J. The judgment recovered by the city of Reading against the United Traction Company was for moneys expended in doing that which, under the evidence and instructions of the court, the jury found ought to have been done by the traction company on those portions of the streets of the city occupied by it. The claim of the city is made up in part of the cost of paving with asphalt from the outside of the rails to the limit of the sills. As to this item, amounting, without interest, to \$1,848.75, the court instructed the jury to find for the plaintiff, for the manifestly correct reason that the street railway companies, which leased their lines to the appellant, had "assumed the duty of putting down asphalt pavement on the outside of their rails to the extent of the sills whenever the city might undertake to put down asphalt on the balance of the street." As to the remaining portion of the city's claim—\$8,292.48—which the jury found it had expended in making necessary repairs on those portions of the streets between the rails, the appellant contends that there ought not to have been a recovery, for the reason that its duty as to the space between the rails is fixed by the charters and ordinances under which its tracks were laid on the streets, and, as it is not expressly required by them to repair between the rails, it is not liable for the amount expended by the city in doing so.

The streets of a city belong to the state for the use of the people at large. To the municipality, as its agent, it commits the

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duty of at all times keeping them in proper repair for the convenience and safety of the public. This duty of the municipality does not shift, except when it is expressly or impliedly imposed upon another. Before the adoption of our present Constitution street railway companies were authorized to occupy streets without municipal consent. Now they can be authorized to do so only with such consent; but, no matter how authorized, the authority under which streets are occupied, unless expressly relieving such companies from the duty of keeping in repair those portions of the streets occupied by their tracks, carries with it a liability on their part to do so. When street railway companies occupy portions of streets, such portions are no longer in the free, unincumbered, and exclusive use of the public, but to the companies is given, not only a concurrent, but a superior, right to use them, and with this right goes a corresponding responsibility. As between a street railway company and a municipality whose streets are occupied by such a company, the duty no longer rests upon the municipality of keeping in repair those portions of the streets used by the company, but devolves upon the company acquiring the right to use them for its corporate purposes. When the state gives up a portion of one of its highways to a particular use, without providing that what had been the duty of the municipality as to it shall continue, such duty devolves upon the party acquiring the right to use it, and a street railway company, given the right to use such portion of a street as is needed for its tracks, in taking charge of it, is charged with the duty of properly maintaining it. It is because the municipality, as the agent of the state, has charge of the streets, that it must maintain and keep them in proper repair, and when the state permits this charge, as to a portion of a street, to be committed to another, it must be understood as imposing upon such party the responsibility that formerly rested upon the municipality, unless in the grant, or in the municipal consent thereto, of the right to use a portion of the street, such responsibility is expressly withheld and its imposition continued upon the municipality.

In submitting the claim of the appellee to the jury they were instructed that the city should not recover, unless they found, first, that the repairs made by the city were necessary and proper; secondly, that the appellant had been notified by the city to repair the tracks by paving them with asphalt; and thirdly, that the repairing by asphalt was reasonable, necessary, and proper, taking into consideration the condition of the rest of the street and the condition in which the city was about to place it. The findings of the jury on these three questions were in favor of the appellee. We do not deem it needful to say more about this case. It is clearly ruled by the general principles announced in *Reading v. United Traction Co.*, 202 Pa. 571, 52 Atl. 106, as is demonstrated in the opinion of the court overruling the motion for a new trial. In that case, in affirming the judgment below, we adopted, as correctly expressive of our views, the words of

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the present learned trial judge, that "it is recognized, with substantial unanimity, that a railway company, whether general or passenger, is bound to keep the portion of the streets occupied by its right of way in good condition, even in the absence of any express contract of statutory direction to that effect. 2 Wood, Railroads, pp. 758, 760; Pierce, Railroads, p. 245; Mills, Em. Dom. § 198; Elliott, Roads and Streets, p. 591; Worster v. R. R. Co., 50 N. Y. 203; North Hudson County Ry. Co. v. Hoboken, 41 N. J. Law, 71; Ry. Co. v. State, 87 Tenn. 746, 11 S. W. 946."

Judgment affirmed.

BIG SANDY RY. CO. v. FLOYD COUNTY.

(Court of Appeals of Kentucky, April 17, 1907.)

[101 S. W. Rep. 354.]

Highways—Proceedings to Vacate.—Ky. St. 1903, § 4289, provides that all applications to have a road changed or discontinued shall be by petition to the county court upon the notice provided for by section 4290. Held, that the only way in which a public highway could be suspended or vacated was by an order of the county court made in accordance with sections 4289, 4290, and that a parol agreement by the county judge was insufficient to authorize a change in a public highway.

Jury—Competency—Citizen of County.*—Citizens of a county, by reason of that fact alone, are not disqualified to serve as jurors in an action brought by the county to recover damages against a railroad company for the destruction of a public highway.

Highways—Destruction by Railroad—Action for Damages—Measure of Damages.—Inconvenience or injury to the traveling public

*For the authorities in this series on the subject of the competency of jurors in actions by or against railroad companies, see *Croft v. Chicago, etc., Ry. Co.* (Iowa), 21 R. R. R. 583, 44 Am. & Eng. R. Cas., N. S., 583 (no juror was disqualified, in action against railroad for personal injuries, on account of what he had read or heard about the accident); *Fitts v. Southern Pac. Co.* (Cal.), 20 R. R. R. 857, 43 Am. & Eng. R. Cas., N. S., 857 (juror was disqualified on account of his prejudice against damage suits); *Denham v. Washington Water Power Co.* (Wash.), 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689 (though juror stated he was prejudiced against personal injury cases, a challenge for cause was properly overruled, though he also stated that it might require some evidence to remove his prejudice); *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179 (that juror was married to half-sister of one of defendant railroad's secret service employees, which fact, if known, would have induced the exercise of a peremptory challenge was immaterial, in action against railroad for injuries to one who had been in its employ; *Simons v. Mason City & Ft. D. D. Co.* (Iowa), 17 R. R. R. 469, 40 Am. & Eng. R. Cas., N. S., 469 (on appeal from award in condemnation proceedings, it was not an abuse of discretion for the court to permit plaintiff's counsel to ask jurors if the finding of the sheriff's jury would have any weight with them in finding the value of the land, for the purpose of enabling appellant to intelligently exercise

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by reason of the destruction of a public highway by a railroad company cannot be considered in estimating the damages sustained by the county but only the cost of putting the road in as good a condition as it was before the railroad was built.

Appeal from Circuit Court, Floyd County.

"To be officially reported."

Action by Floyd county against the Big Sandy Railway Company to recover damages for the destruction of a public highway. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

F. T. D. Wallace, Walter S. Harkinks, and W. H. Wadsworth, for appellant.

A. J. May, Co. Atty., for appellee.

NUNN, J. In building its road through Floyd county the appellant constructed it on and adjoining a public highway a considerable distance, and in so doing practically destroyed the public highway. In some places it was filled with rocks and dirt to a depth from 6 to 12 feet. This was done about the year, 1904, and the county brought this action to recover damages for the destruction of the public highway. Upon the trial the jury returned a verdict against appellant for \$1,700. This public highway was situated near Sandy river, in Floyd county, and the county of Johnson was situated on the opposite side of the river. Appellant claims that it, by the consent of the county judge of Johnson county and the county judge of Floyd county, changed this road over into Johnson county, where it succeeded in making a better road. This is not a defense to the action. Public highways cannot be abolished or changed in this manner. The county judge of Floyd county had no authority in this manner to make a change of a public highway by consenting orally to it. The only authority he had to make the change was by an order of court, made in accordance with sections 4289 and 4290 of the Kentucky Statutes of 1903. Appellant contends that this was not a public highway. The record of the county court produced by the county court clerk showed that it was established as a public highway about the year 1865, and surveyors, or overseers, were appointed every few years from that time to 1905, and were allotted hands to keep the road in repair. It is true, as shown from the evidence, that it was not well kept; but the proof clearly shows that it was used as a public highway all that time.

his peremptory challenge); *Illinois, I. & M. Ry. Co. v. Freeman* (Ill), 16 R. R. R. 360, 39 Am. & Eng. R. Cas., N. S., 360 (right to challenge jurors, under Illinois statute, as affected by fact that each of several persons had an undivided interest in the land sought to be condemned); *Missouri, etc., Ry. Co. v. Elliott* (Ind. Terr.), 14 Am. & Eng. R. Cas., N. S., 587 (having had a claim for damages against a railroad company does not disqualify a person as a juror, in an action against such company); *Augusta So. R. Co. v. McDade* (Ga.), 12 Am. & Eng. R. Cas., N. S., 548 (stockholders and employees of a lessee railroad company are not disqualified to act as jurors in action against lessor).

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Appellant contends that the court erred, to its prejudice, in overruling its motion to have a jury summoned from an adjoining county to try the case; that the interest of the citizens of Floyd county in the result of the litigation disqualified them from acting as jurors. This court has repeatedly decided that such interest did not incapacitate them for such service. *Kemper & Wife v. City of Louisville*, 14 Bush, 87, and *Kentucky Wagon Mfg. Co. v. City of Louisville*, 97 Ky. 548, 31 S. W. 130.

The court gave the following instruction to the jury: "Before plaintiff can recover in this case, it must have shown by a preponderance of the evidence that Floyd county, through its order of record, had established a county road as set out in the petition, or that said road, if not established by orders, that the same was recognized as a county road by the county, and that same has been used as a county road, having overseers appointed to superintend same and hands allotted to work and worked the same, for more than 15 years before the filing of this suit. Then, if you believe the defendant company by its agents or employees obstructed or destroyed said road without authority of the county officials, and made it unfit for travel, you will find for the plaintiff in such sum as you may believe from the evidence it has been damaged thereby, not to exceed \$1,900, the damages to be estimated by the cost it would be to construct a road or remove the obstructions placed in said road, and make the same in as good condition as it was before or the difference in inconvenience to the traveling public in traveling the road now traveled and over the former way. Unless you believe as above, you will find for defendant." The error in this instruction, to the prejudice of appellant, is in fixing the measure of damages. The following should have been omitted therefrom, to wit: "Or the difference in inconvenience to the traveling public in traveling the road now traveled and over the former way." The county of Floyd had no right to recover for the inconvenience or injury to the traveling public. If the travelers were inconvenienced or injured, they alone had a cause of action therefor. The county is only authorized to recover in this action the reasonable cost of putting the county road in as good condition as it was before the road was built. See case of *Richmond, Nicholasville, Irvin & Beattyville R. R. Co. v. Estill County*, 105 Ky. 808, 49 S. W. 805. The instruction is also prejudicial to appellee in the use of the following words: "Without authority of the county officials." The officials had no authority to permit appellant to obstruct or destroy the road, except in the manner prescribed by the sections of the statute above referred to. The court should have given the instruction refused, to the effect that the only way in which a county road can be suspended or vacated is by order of the county court entered of record, and a parol agreement by the county judge is not sufficient to authorize appellant to appropriate the highway in question.

By reason of the error in the first instruction referred to, the judgment is reversed and the case remanded for a trial consistent with this opinion.

WERTZ et al. v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, March 25, 1907.)

[57 S. E. Rep. 194.]

Bridges—Injury from Defects—Duty to Repair—Contract of Railroad—Evidence.—In an action against a railway company for injuries caused by a horse falling into a hole in a bridge, evidence held to sustain a finding that the predecessor of the railway contracted with the owner of a ferry to maintain the bridge in a manner suitable for the crossing of men and vehicles in connection with its railway bridge.

Same.—Where a railway company contracted with the owner of a ferry across a river to maintain a bridge across the river at that point suitable for persons and vehicles, it is liable to the owner of a horse for injuries received by falling into a hole in the bridge.

Appeal from Common Pleas Circuit Court of Newberry County; Memminger, Judge.

Action by Jonathan A. Wertz and Lee H. Wertz against the Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. P. Cothran, for appellant.

Caldwell & Park and *Hunt, Hunt & Hunter*, for respondents.

GARY, A. J. This is an action for damages, alleged to have been sustained by the negligence of the defendant, while crossing the bridge hereinafter described. The complaint contains the following allegations: "That defendant's railroad crosses Saluda river at a place where there now is, and has been for more than 50 years, a public highway, running to the river bank in the county of Newberry on one side, and in Greenwood county on the other side. That the plaintiffs are informed and believe that about the year 1850, when the said line of railroad was built by the Greenville & Columbia Railroad Company, that corporation, by contract with one or more of the owners of property adjacent to the crossing point, on Saluda river above mentioned, and to supply the place of the ferry, long in use at that point, as well as to secure a proper crossing for railroad trains, constructed one bridge, for the two purposes of enabling that railroad company to run its trains across the said river, and also of enabling persons, animals, and vehicles to cross the said river; that bridge being a single structure resting on the said piers, sills, and sleepers and under the same roof. That under this contract the Greenville & Columbia Railroad Company obligated itself to keep the bridge in safe and proper condition. That the defendant, after it acquired the ownership of the line of railroad formerly owned and operated by the Greenville & Columbia Railroad Company, continued to recognize the right of the trav-

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eling public to use the bridge for the purpose of crossing the river, and recognized its own duty to keep in safe condition the portion of the bridge allotted as aforesaid to the passage of men, animals, and vehicles. That, after the defendant became the owner of the line of railroad, including the bridge above described, to wit, in the year 1902, the defendant, for reasons not necessary to recite, decided to separate the two lines and means of travel across the said bridge, and constructed a new crossing on the said river, at the said point, for all persons and things traveling otherwise than on railroad trains, and by extending and increasing the supports for the floor of such separate ways of travel, and by laying a floor and providing railings to protect travelers, substituted a new bridge for the crossing of persons and things that way, and removed the way previously used for that purpose. That this new bridge was built by the defendant, as its own property, at its own expense, and was in every way a substitute for the old one. That neither of the counties, through which said highway ran, ever owned or controlled the bridge, or were obligated in any manner to keep it in repair, except as to the approaches to the bridge." The complaint then states the manner in which the plaintiff was injured.

The defendant answered the complaint, denying generally its allegations, except the formal portions thereof. At the close of the plaintiff's testimony, the defendant made a motion for nonsuit, on the following grounds: "There is no evidence tending to show there was any contract or understanding, express or implied, on the part of the defendant, which obligated it to keep in repair the wagon passageway of the bridge in question. The further ground is that we were entitled to notice if we have assumed the obligation to keep that bridge in repair." This motion was refused. The jury rendered a verdict in favor of the plaintiff for \$450.

The defendant made a motion for a new trial on the following grounds: "(1) There is absolutely no testimony of any contract between the Greenville & Columbia Railroad Company, and any person whomsoever, which would bind it to maintain a bridge at the point in question. (2) The plaintiffs' testimony showed that the defendant, Southern Railway Company, did not acquire the railroad until July 10, 1894, and therefore could have had nothing to do with the old bridge, which was torn down in 1892. (3) It was shown by the plaintiffs that the new bridge was built by the Richmond & Danville Railroad Company in 1892, two years before the defendant acquired the railroad. (4) It was not shown that the defendant, Southern Railway Company, from 1894 to May, 1903, ever placed a plank or drove a nail upon the wagon part of the bridge, or recognized in any way an obligation on its part to maintain the bridge, or that it had any knowledge of a contract by its predecessors to do so, if such contract existed. (5) The testimony was full to the effect that both Greenwood and Newberry Counties had assumed jurisdiction of the bridge, and recognized their respective ob-

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ligations to repair, to the center of the bridge, by continually making repairs upon it. (6) That the plaintiffs have failed to adduce any testimony tending to establish the material allegations of the complaint. (7) The presumption is that a bridge which is a part of a highway, in use by the public, should be kept in repair by the county authorities, and that duty cannot be imposed upon another, unless it appear that such other is under a legal obligation to do so; that the burden of so doing is upon plaintiffs, in which they have failed. (8) Granting, for the sake of argument, that a contract between the Greenville & Columbia Railroad Company and Dyson had been established, as alleged in the complaint, it would not be binding upon the defendant, Southern Railway Company, unless the plaintiffs had made it appear that the Southern Railway Company had had knowledge of that contract, and assumed as a personal covenant the obligations under it, of which there is no evidence. (9) Granting, for the sake of argument, that a contract with the Richmond & Danville Railroad Company and the county of Newberry had been established, to the effect that the Richmond & Danville would maintain and repair the bridge in question, such contract would not be binding upon the defendant, Southern Railway Company, unless the plaintiffs had made it appear that the Southern Railway Company had had knowledge of that contract, and assumed as a personal covenant the obligations under it, of which there is no evidence. (10) The railroad company can obligate itself to maintain a bridge which is to be used by the public as a part of the public highway, where, by reason of its occupancy of a part of the highway, the railroad company, for some consideration or advantage to itself thereby, builds a bridge made necessary by such occupancy and allows the public to use it as a part of the highway. The plaintiffs are not entitled to recover upon this ground, because they have not alleged it in their complaint, and upon the further ground that there is no evidence tending to establish such state of facts."

The following are the reasons assigned by his honor, the presiding judge, in refusing the motion: "This action was for damages to Mrs. Wertz and her horse, caused by the horse stumbling through a hole in a bridge across Saluda river, attached to and a part of the Southern Railway Bridge there. In support of the allegations of the complaint, that there was a contract between the predecessors of the Southern Railway, which had descended to it, to keep this bridge in repair, the testimony was circumstantial, and as to facts wherefrom the jury manifestly concluded that the old Greenville & Columbia Railroad, which originally built the bridge in the place of Dyson Ferry, did contract to maintain the bridge, as alleged in the complaint, and that the Richmond & Danville Railroad, which built the bridge over, in 1892, and the Southern Railway, which acquired the property from them in 1894, recognized and adopted said contract also. The jury had before them the testimony, from which they found for such a contract as alleged in the complaint; there being be-

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fore them the basic fact that the bridge was, and is, actually a part of the Southern Railway's structure there across the river. They were fully charged as to the presumption that all public bridges used by the public are presumed to be under the care and control of the county authorities, and that, in order for plaintiffs to recover against the defendant, it must be shown that the defendant, and not the county, was bound to keep the bridge in repair. The evidence upon these points, as before stated, was circumstantial, but it seems to me the jury had a right under our law to pass upon these questions. As to the amount of damages, the question was fairly placed before the jury, and they placed it at a figure which seemed to them proper from the testimony, and I do not see that I would be warranted in interfering in that particular here. If there is any error in the case, it is upon the question of proof of the contract alleged in the complaint as necessary to overcome the presumption as in the responsibility of the county for the condition of the bridge; and I confess to having had some misgivings upon this point, especially after reading the powerful argument of defendant's attorney, submitted upon this motion for new trial. However, after carefully considering the matter, I am not satisfied that a new trial should be granted. I am perfectly satisfied from the testimony that there was such a contract between Dyson and the Greenville & Columbia Railroad, and that such contract was known, recognized, and acted upon by the Richmond & Danville Railroad in rebuilding the bridge just before the Southern Railway acquired the property; and, it appearing that the Southern Railway succeeded to the Richmond & Danville with this bridge annexed to its railroad bridge and used by the public as a part of the highway, it assumed the duty to maintain that bridge for men and vehicles, as much as it did its bridge for engines and cars. The jury have grounds for the facts as alleged in the complaint, from the facts and circumstances put in evidence, and I think the verdict should stand. There was evidence in the case to show that the county authorities of Newberry and Greenwood counties did, from time to time, put repairs on this bridge; but, even if that be so, that would not be sufficient to relieve the defendant from its duty to repair the bridge, if legally bound to do so, as the jury found it was."

The appellant's exceptions assign error in the refusal to grant the motions for nonsuit and new trial. The only question is whether there was any testimony tending to sustain the material allegations of the complaint. The evidence is circumstantial, but this court is satisfied, for the reason stated by the presiding judge, that when considered in its entirety, it tended to prove the allegations of the complaint. It was well said by Waties, J., in *Frost v. Brown*, 2 Bay, 133, 139, that: "One of the highest modes of proof is to show the existence of circumstances which could not have existed, if the fact to be proved had not pre-existed. And what is this kind of proof, but presumption? *A single circumstance may have little strength, and of itself*

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afford no foundation; but when joined to many of the same nature, all fitting each other, and having the same relation, the whole, united, may form an arch strong enough to support a presumption of the most important fact." (Italics ours.) The rule is thus stated in *Railroad v. Partlow*, 14 Rich. 237, 244: "It may be that no one of the facts would of itself warrant the interference and yet, when taken together, they may produce belief, which is the object of all evidence. * * * This is usually the case, where an issue depends on circumstantial evidence." In Greenl. Ev. § 51a, it is said: "It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it." This language is quoted with approval in the case of *Dantzler v. Dantzler*, 75 S. C. 334, 55 S. E. 774..

It is the judgment of this court that the judgment of the circuit court be affirmed.

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(Supreme Court of Arkansas, April 7, 1906.)

[93 S. W. Rep. 757.]

Railroads—Accidents at Crossings—Care in Going on Tracks.*—

A traveler approaching a railroad crossing must not only look and listen for the approach of trains before he goes on the track, but must continue to look and listen until he has passed the point of danger.

Same—Contributory Negligence—Burden of Proof.†—Where, in an action against a railroad company for the death of a traveler struck by a train at a crossing, it did not appear that decedent did not look both ways before as well as after he went on the track, the burden was on the company to show that he did not do so, in order to prove contributory negligence precluding a recovery.

Same.—Decedent, while crossing a side track, was struck by a work train backing against him. There was no proof that he knew that an engine was attached to the cars on the side track, and if he did there

*For the authorities in this series on the subject of the care required of a highway traveler to discover the approach of trains before attempting to cross railroad tracks, see foot-notes appended to *Stokes v. Southern Ry. Co.* (Va.), 18 R. R. R. 731, 41 Am. & Eng. R. Cas., N. S., 731, foot-notes appended to *Rrammer v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

†For the authorities in this series on the subject of the presumption of the exercise of due care by a person killed by a train or car, see foot-notes appended to *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Gorham v. Milford, etc., Ry. Co.* (Mass.), 18 R. R. R. 745, 41 Am. & Eng. R. Cas., N. S., 745; foot-notes appended to *Looney v. Metropolitan R. Co., etc.* (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617; foot-notes appended to *Donaldson v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 424, 41 Am. & Eng. R. Cas., N. S., 424.

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was nothing to show that he might not reasonably have assumed that the train would pull out of the switch forward and not backward. Held that, though decedent was not justified in ignoring the probability of the train backing toward him and in failing to keep a lookout for such emergency, the facts were a circumstance for the jury to consider whether decedent might not, in the discharge of the duty of looking both ways for his own safety, have reasonably relaxed his vigilance in failing to look toward the rear of that train.

Same—Question for Jury.—Evidence in an action against a railroad company for the death of a traveler at a crossing examined, and held, that the question of decedent's contributory negligence was for the jury.

Trial—Instructions—Requests—Necessity.—A party who has not asked for a specific instruction in proper form on a given theory cannot complain of the failure of the court to give an instruction on that theory, where the instructions given are free from error.

Railroads—Accident at Crossing—Contributory Negligence—Instructions.—Decedent was killed while crossing a side track in consequence of a train backing against him. Decedent stood on the side track waiting for a passenger train to pass. Held, that an instruction that if decedent could have waited for the passenger train to pass before going on to the side track and failed to do so, he was guilty of negligence, was erroneous, for the fact that he went on the side track without waiting for the departure of the passenger train had no proximate relation to the injury.

Trial—Instructions—Requests.—Where the court struck out an objectionable part of a requested instruction, and made additions thereto, so as to make the instruction correct as far as it went, it was the duty of the party requesting the instruction, if he desired an instruction on a point embraced in the instruction requested and not given by the court in its modified instruction, to request a specific instruction.

Death—Damages—Excessive Damages.—In an action for death, it appeared that decedent was 56 years of age, engaged in farming with an earning capacity of from \$400 to \$500 per annum. He labored in the field himself, as well as superintended the work on his farm. His wife and daughters and one of his sons (one of the children being a minor) lived with him on the farm. There was no direct proof of the amount of his contributions to the support of his family. Held, that a verdict of \$2,000 would not be set aside as excessive.

Appeal from Circuit Court, Perry County; Edward W. Winfield, Judge.

Action by F. P. Baskins, as administrator of Owington Baskins, deceased, against the Choctaw, Oklahoma & Gulf Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Pierce and *T. S. Busbee*, for appellant.

J. F. Sellers and *Jno. D. Shackelford*, for appellee.

MCCULLOUGH, J. This was an action brought by F. P. Baskins, as administrator of the estate of Owington Baskins, de-

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ceased, against the Choctaw, Oklahoma & Gulf Railroad Company, to recover damages for alleged negligent killing of deceased. He was run over and killed by a train of cars operated by appellant at Casa, Ark., and damages for the benefit of the widow and next of kin of deceased in the sum of \$2,000 were asked. Appellant pleaded contributory negligence on the part of deceased, and it is contended now that the court erred in refusing to give a peremptory instruction to the jury to return a verdict in his favor. The details of the injury, as related by witnesses, were as follows: The railroad track runs due east and west, and the depot at Casa is situated on the north side of the main track. There is a side track south of the main track, and both intersect a street running due north and south immediately west of the depot. The injury occurred about 5 o'clock in the afternoon, and a few minutes before the arrival of a passenger train from the east a work train with a caboose or box car attached to the rear end came in from the east and passed the station and backed in on the side track to await the arrival and departure of the passenger train. The rear end of the work train stopped on or near the street crossing mentioned above. When the passenger train arrived, deceased started toward the depot from one of the storehouses south of the track, and walked along the west side of the street going north until he came within a short distance of the track, when he crossed the street diagonally, following a footpath which crossed the track on the east side of the street, and walked upon the side track and stopped 15 or 20 feet east of the rear end of the caboose or box car. The witness who related these facts said that deceased stopped there from a half minute to a minute and a quarter, when the work train backed up and struck him, and that the end of the train was about 15 or 20 feet from him when it began to move. The work train had been standing there from 3 to 5 minutes. The passenger train was then moving out and was making considerable noise, but no signals were given from the work train either by bell or whistle, and no lookout was kept from the rear end. Deceased was blind in his left eye—the eye on the side next to the work train. There is no evidence that deceased did not look for the moving train, except the fact that it was broad daylight and he could have seen it if he had been looking that way at the time. It is evident from the testimony that deceased stopped momentarily on the side track awaiting the departure of the passenger train, which was then just moving out from the station, and the rear coach was passing deceased when he was struck by the backing work train.

It is not insisted that the evidence is insufficient to sustain a finding of negligence on the part of the men in charge of the work train in failing to give signals by bell or whistle and in failing to keep a lookout. This is conceded. But appellant contends that deceased could have seen the moving work train if he had looked, and that his failure to see it and get out of the way establishes negligence on his part which prevents a recovery. It

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is, of course, too plain for controversy that he could have seen the end of the car if he had been looking that way at the moment, but it does not necessarily follow that he was negligent in failing to see it. The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways up and down the track. *Railway Co. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *Railway Co. v. Tippet*, 56 Ark. 457, 20 S. W. 161; *St. L., I. M. & S. Ry. Co. v. Martin*, 61 Ark. 549, 33 S. W. 1070; *Martin v. L. R. & Ft. S. Ry. Co.*, 62 Ark. 158, 34 S. W. 545; *Railway Co. v. Blewitt*, 65 Ark. 235, 45 S. W. 548; *St. L. & S. F. Ry. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64; *St. L., I. M. & So. Ry. Co. v. Johnson (Ark.)* 86 S. W. 282; *Tiffin v. Railway Co.*, 93 S. W. 564. But, as the traveler is required to look both ways for danger, it is obvious that he cannot do so at precisely the same moment. It must be remembered that deceased was upon the track probably not more than half a minute, and in that time he was required to look toward the east as well as toward the west. He would have been guilty of negligence if he failed to do so. It does not appear from the evidence that he did not look both ways before as well as after he went upon the track. He may have done so, and the burden was upon the defendant to show that he did not do so. The work train was headed in an opposite direction, with the rear end standing upon or near the street crossing. There is no proof that deceased knew that an engine was attached to the cars on the side track, but if he did know, he might reasonably have assumed that the train would pull out of the switch forward, and not backward. We do not mean to say that this state of facts justified deceased in ignoring the possibility or probability of the train backing toward him and in failing to keep a lookout for such emergency, but it was a circumstance for the jury to consider whether deceased, being at the time under obligation to look both ways for his own safety, might not, in the discharge of that duty, have reasonably relaxed his vigilance to some extent in looking toward the west where this train was situated, and consumed more time than he otherwise would have done in looking toward the east, where there was also a possibility of danger. He might have done so consistently with due care. Though he was bound to look both ways, the frequency with which he was bound to change his view depended upon circumstances and the probability of danger to be apprehended, and of this the jury were the judges. The law required him to exercise such degree of care in that respect as was reasonably necessary to discover the danger and avoid injury.

The train was standing within 15 or 20 feet of him, backed up to the street crossing, and headed in the other direction; he

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had doubtless observed its position before and perhaps after he went upon the track and saw that it was motionless; it was put in motion noiselessly and amidst the noise of the departing passenger train, and there is no evidence that he did not look in that direction the moment before it was set in motion. Under those circumstances, and with the burden upon appellant to show that deceased did not exercise proper care, how can we say, as a necessary conclusion from this evidence, that he was guilty of negligence in failing to discover the motion of the car over a space of 15 or 20 feet? We cannot do so. That was for the jury, and we will not disturb a verdict based upon a conclusion they reached upon that state of the proof. The following language of the New York Court of Appeals in discussing the same question upon a somewhat similar state of facts is quite appropriate here: "Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined, as a matter of law, and whether upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer." *Greany v. Long Island R. Co.*, 101 N. Y. 419, 5 N. E. 425.

Learned counsel for appellant press upon our attention with much force, as conclusive of this case, the decision of this court in *Railway Co. v. Martin*, *supra*, but we cannot agree with them that that case is decisive of this. We do not undertake to depart from the principles of law announced in that case, nor do we recede from its application to the facts of that case. But it is not applicable to the facts of the case at bar. In that case the injured party went upon the track at night and the witness testified that the noise of the approaching train was plainly heard; that he heard it plainly, though his sense of hearing was imperfect. So the court said, the injured person's sense of hearing being unimpaired, that he must have heard the noise and failed to avoid the injury, and was therefore guilty of contributory negligence. In the case at bar, though it was the duty of deceased to look out for the danger, it was for the jury to say whether, considering all the circumstances and his duty to look in the other direction also, he failed to turn and look in each direction with sufficient frequency to acquit himself of negligence. *S. L., I. M. & So. Ry. Co. v. Tomlinson* (Ark.) 64 S. W. 347. "It will be presumed that the injured party was in the exercise of due care until the contrary is made to appear." *Railway Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245; *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230; *Jones v. Malvern Lumber Co.*, 58 Ark. 125, 23 S. W. 679; *Railway Co. v. Martin*, *supra*.

The court, on motion of appellant, gave instructions to the jury covering generally the doctrine of contributory negligence and the duty of travelers going upon a railroad crossing to look

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and listen for the approach of trains. But the court refused to give an instruction asked by appellant containing a specific declaration as to the duty of the traveler to continue to look and listen until all danger be passed. The instruction in question was modified by the court and is as follows (that part which was stricken out by the court appears here in parentheses, and the addition thereto made by the court appears in italics): "You are instructed that a railroad track is in itself a warning of danger, and if you find that deceased went upon the side track of defendant and stopped on said side track to wait for a train on the main line to pass, and that while on said side track he was backed over by a freight train (but that deceased could have waited for said passenger train to pass before going on to the side track, or), *and by looking in the direction from which said freight train came could have seen it and failed to do so and thereby have avoided being injured, and such failure contributed to the injury*, then he was guilty of negligence, as a matter of law, and your verdict will be for the defendant, notwithstanding you may find that defendant was also guilty of negligence (and you are instructed in this connection that it was the duty of the deceased to continue to look and listen in both directions until all danger had passed)." As we have already said, this court has repeatedly declared the rule that travelers upon a railroad crossing must maintain the required vigilance and continue to look and listen until the danger be passed, and if an instruction on that subject in proper form had been asked the court should have given it. But the court should not have given an instruction containing erroneous statements of the law in other respects, and was not bound to give an instruction on the subject when none was asked in proper form. A party who has not asked for a specific instruction in proper form upon a given theory cannot complain at the failure of the court to give an instruction upon that theory, when the instructions given by the court are free from error. *Allison v. State* (Ark.) 86 S. W. 409. Now, the instruction, as framed by appellant, contained an erroneous statement of law, which was stricken out by the court, to the effect that if deceased could have waited for said passenger train to pass before going on to the side track, and failed to do so, he was guilty of negligence. This was manifestly erroneous, and was properly stricken out by the court. The fact that deceased went upon the side track without waiting for the departure of the passenger train had no proximate relation to the injury. It might as well have been said that if he had remained at home that day instead of coming to town and crossing the railroad track he could have avoided the injury and was, therefore, guilty of negligence. If deceased was guilty of negligence at all which was the proximate cause of the injury, it was in failing to look and listen for the moving train. With this objectionable part of the instruction stricken out, and the additions which were made, the court might well have given it to the jury without further subtraction; but it was a correct statement of

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the law in the form in which it was given, and if the defendant desired that the clause concerning the duty of the traveler to continue to look and listen should be retained in the instruction, it should have made the request. Not having done so, it cannot complain at the giving of an instruction which, as modified, was a correct statement of the law, nor at the refusal of court to give an instruction which, without modification, was, as a whole, an erroneous statement of the law.

It is next urged that the assessment of \$2,000 damages was excessive. Deceased was a stout, healthy man 56 years of age, actively engaged in farming, with an earning capacity of from \$400 to \$500 per annum. He labored in the field himself as well as superintended the work on his farm, and, as the testimony shows, made a good hand at labor. His wife and daughters and one of his sons (one of his children being a minor) lived with him on the farm. There is no direct proof of the amount of his contributions to the support of his family, but the presumption will be indulged that, as they lived with him on the farm, a reasonable amount of his earnings was contributed to their support. There is not, under those circumstances, an entire absence of proof of such contributions, as contended by appellant. We must presume that he discharged his duty, in some measure, to them. An assessment of \$2,000 as compensation for loss of a husband and father of industrious habits and with a life expectancy of about 17 years and with an earning capacity of \$400 a year cannot be said to be excessive. The proof of the amount of contributions to the support of his family by deceased could have been more specific and satisfactory, but we think it was sufficient to justify a verdict for the amount awarded by the jury.

Judgment affirmed.

DAMSELLE HOWARD, Administratrix of Will Howard, Deceased,
Plff. in Err. v. ILLINOIS CENTRAL RAILROAD COMPANY and
Yazoo & Mississippi Valley Railroad Company. N. C.
BROOKS, Administratrix of Morris S. Brooks, Deceased,
Plff. in Err. v. SOUTHERN PACIFIC COMPANY.

(Argued April 10, 11, 1907. Decided January 6, 1908.)

[28 Sup. Ct. Rep. 141.]

Commerce—Power of Congress—Abolition of Fellow-Servant Doctrine.—Congress may prescribe, as between an interstate carrier and such of its employees as are engaged in interstate commerce, that the carrier shall be liable for the death or injury of any such employee while so engaged which may result from the negligence of a fellow servant.

Commerce—Power of Congress—Regulation of Intrastate Commerce—Validity of Employers' Liability Act.—A regulation of intrastate as well as of interstate commerce, and therefore one beyond the

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power of Congress to enact, is made by the provision of the employers' liability act of July 11, 1906 (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees."

Statutes—Invalid in Part—Validity of Federal Employers' Liability Act.—The invalidity, as applied to intrastate commerce, of the provision of the employers' liability act of July 11, 1906, that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees," invalidates such provision as applied to interstate commerce.

Commerce—Federal Control of Interstate Carrier.—A carrier, by engaging in interstate commerce, does not thereby submit all its business affairs to the regulating power of Congress.

Two writs of error directed respectively to the Circuit Court of the United States for the Western District of Tennessee and to the Circuit Court of the United States for the Western District of Kentucky to review judgments dismissing, on demurrer, the declarations in actions to recover damages from an interstate carrier for the death of an employee occasioned by the negligence of a fellow servant. Affirmed.

See same case below, No. 216, 148 Fed. 997; No. 222, 148 Fed. 986.

The facts are stated in the opinion.

Mr. *William R. Harr* for plaintiff in error in No. 216.

Messrs. *Jesse E. Torrance*, *S. C. Bloss*, *George Durelle*, and *W. M. Smith* for plaintiff in error in No. 222.

Messrs. *J. M. Dickinson*, *Blewett Lee*, and *Charles N. Burch* for defendants in error in No. 216.

Messrs. *Alexander Pope Humphrey*, *R. S. Lovett*, and *Maxwell Evarts* for defendant in error in No. 222.

Attorney General *Bonaparte* and Mr. *William R. Harr* for the United States.

MR. JUSTICE WHITE delivered the opinion of the court.

To dispose of these cases it is necessary to decide a fundamental question which is equally decisive as to both. They were argued at the bar together, and because of their unity have been considered at the same time.

As stated in the declarations as finally amended, recovery was sought in each case of damages occasioned by the death of the respective intestates while serving as a fireman on a locomotive actually engaged in moving an interstate commerce train. In each of the cases it was alleged that the intestate met his death through no fault of his, but solely through the fault of employees of the company, who were his fellow servants. In both

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the right of action was expressly based upon the act of Congress of July 11, 1906, entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to their Employees." [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891.] By demurrer in each of the cases the act relied upon was assailed as being repugnant to the Constitution of the United States. In both cases the Department of Justice, on behalf of the United States, asked to be allowed to intervene for the purpose of supporting the constitutionality of the act. In the first (the Howard) case this request was granted. In the second (the Brooks) case the court, while denying the request upon the ground that it knew of no law authorizing such an intervention simply because the validity of an act of Congress was drawn in question, nevertheless permitted the United States to be heard as a friend of the court. In both cases the act was held to be unconstitutional, the demurrer was sustained, and the declarations dismissed. These direct writs of error were then prosecuted, and at bar the cases have been argued, by printed brief and orally, not only by the parties in interest, but on behalf of the United States through the Attorney General as a friend of the court.

As the issue to be decided is whether the courts below were right in holding that the act of Congress, which was the basis of the respective causes of action, was repugnant to the Constitution of the United States, we reproduce the text of that act in the margin.*

Before coming to consider the contentions concerning the constitutionality of the act, we notice certain suggestions which

*Chapter 3073. An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to Their Employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Sec. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be di-

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proceed upon the assumption that they may concern the issue for decision. It is said that the statute inordinately extends the power of Congress and unduly diminishes the legislative authority of the states, since it seeks to exert the power of Congress as to the relation of master and servant,—a subject hitherto treated as being exclusively within the control of the states; and that in practice its execution will cripple the state and enlarge the Federal judicial power, since its effect will be to cause every action concerning an injury to a servant employed by a common carrier who may engage in interstate commerce to cease to be a matter of state jurisdiction, and to be cognizable in the Federal Courts. Moreover, it is said, the statute will create confusion and uncertainty as to the rights of those dwelling within the states, that it will operate injuriously upon all who choose to engage in interstate commerce as a common carrier, since those who so do will become subject to the liability which the statute creates, to be tested by the rules of negligence which the statute embodies, although such rules be unknown to the laws of the several states. Besides, the statute, it is urged, discriminates against all who engage as common carriers in interstate commerce, since it makes them responsible without limits as to the amount to one servant for an injury suffered by the acts of a coservant, even in a case where the negligence of the injured servant has contributed to the result, hence placing all employers who are common carriers in a disfavored, and all their employees in a favored, class. Indeed, it is insisted the statute proceeds upon contradictory principles, since it imposes the increased responsibility just stated upon the master, presumably in order to make him more careful in the selection of his servants, and yet

minished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

Sec. 3. That no contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, That, upon the trial of such action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

Sec. 4. That no action shall be maintained under this act unless commenced within one year from the time the cause of action accrued.

Sec. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety appliance act of March second, eighteen hundred and ninety-three [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174], as amended April first, eighteen hundred and ninety-six [29 Stat. at L. 85, chap. 87], and March second, nineteen hundred and three [32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1907, p. 885].

Approved June 11, 1906.

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minimizes the necessity for care on the part of the servant by allowing recovery, although he may have been negligent.

But without, even, for the sake of argument, conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act, and not the power of Congress to enact it. We say this since, in testing the constitutionality of the act, we must confine ourselves to the power to pass it, and may not consider evils which it is supposed will arise from the execution of the law, whether they be real or imaginary.

All the questions which arise concern the nature and extent of the power of Congress to regulate commerce. That subject has been so often here considered and has been so fully elaborated in recent decisions, two of which are noted in the margin, that we content ourselves, for the purposes of this case, with repeating the broad definition of the commerce power as expounded by Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70, where he said:

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Accepting, as we now do and as has always been done,[†] this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (p. 194), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce:

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it many very properly be restricted to that commerce which concerns more states than one. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns

[†]*Lottery Case (Champion v. Ames)* 188 U. S. 321, 345, et seq. 47 L. ed. 492, 496, 23 Sup. Ct. Rep. 321; *Northern Securities Co. v. United States*, 193 U. S. 197, 335, 48 L. ed. 679, 699, 24 Sup. Ct. Rep. 436, and cases cited.

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which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

We think the orderly discussion of the question may best be met by disposing of the affirmative propositions relied on to establish that the statute conflicts with the Constitution.

In the first place, it is asserted that there is a total want of power in Congress in any conceivable aspect to regulate the subject with which the act deals. In the second place, it is insisted the act is void, even although it be conceded, for the sake of argument, that some phases of the subject with which it is concerned may be within the power of Congress, because the act is confined not to such phases, but asserts control over many things not in any event within the power to regulate commerce.

While it may be, if we indulged, for the sake of argument, in the hypothesis of limited power upon which the second proposition rests, it would result that a consideration of the first proposition would be unnecessary because the act would be found to be repugnant to the Constitution, because embracing provisions beyond such assumed and restricted authority, we do not think we are at liberty to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress. We say this, for if it be that, from the nature of the subject, no power whatever over the same can, under any conceivable circumstances, be possessed by Congress, we ought to so declare, and not, by an attempt to conceive the inconceivable, assume the existence of some authority, thus, it may be, misleading Congress and giving rise to future contention.

1. The proposition that there is an absolute want of power in Congress to enact the statute is based on the assumption that, as the statute is solely addressed to the regulation of the relations of the employer to those whom he employs, and the relation of those employed by him among themselves, it deals with subjects which cannot, under any circumstances, come within the power conferred upon Congress to regulate commerce.

As it is patent that the act does regulate the relation of master and servant in the cases to which it applies, it must follow that the act is beyond the authority of Congress if the proposition just stated be well founded. But we may not test the power of Congress to regulate commerce, solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think the unsoundness of the contention that, because the act regulates the relation of master and servant, it is unconstitutional, because,

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under no circumstances, and to no extent, can the regulation of such subject be within the grant of authority to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train; that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power, would be but to concede the power and then to deny it; or, at all events, to recognize the power and yet to render it incomplete.

Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we think the error of the proposition is shown by previous decisions of this court. Thus, the want of power in a state to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question. *Mississippi R. Commission v. Illinois C. R. Co.*, 203 U. S. 335, 343, 51 L. ed. 209, 214, 27 Sup. Ct. Rep. 90, and cases cited; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, ante, 121, 28 Sup. Ct. Rep. 121. And decisions cited in the margin,[‡] holding that state statutes which regulated the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until Congress acted, by necessary implication refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by Congress, would be necessarily void because the regulation of the relation of master and servant was, however, immediately connected with interstate commerce, beyond the power of Congress. And a like conclusion also persuasively results from previous rulings of this court concerning the act of Congress known as the safety appliance act. *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158;

[‡]*Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

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Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

2. But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to things which are wholly interstate commerce, but embraces those relations as to matters and things domestic in their character, and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act.

From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that anyone who conducts such business be a "common carrier, engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade of commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do,—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce.

And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates.

Thus, the liability of a common carrier is declared to be in favor of "any of its employees." As the word "any" is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one

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who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from "the negligence of any of its officers, agents, or employees."

The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and, it may be, for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.

On the one hand, while conceding that the act deals with all common carriers who are engaged in interstate commerce because they so engage, and indeed, while moreover conceding that the act was originally drawn for the purpose of reaching all the employees of railroads engaged in interstate commerce to which it is said the act in its original form alone related, it is yet insisted that the act is within the power of Congress, because one who engages in interstate commerce thereby comes under the power of Congress as to all his business, and may not complain of any regulation which Congress may choose to adopt. These contentions are thus summed up in the brief filed on behalf of the government:

"It is the *carrier*, and not its employees, that the act seeks to regulate, and the carrier is subject to such regulations because it is engaged in interstate commerce.

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* * * * *

"By engaging in interstate commerce the carrier chooses to subject itself and its business to the control of Congress, and cannot be heard to complain of such regulations.

" * * * It is submitted that Congress can make a common carrier engaged in interstate commerce liable to *anyone* for its negligence who is affected by it; and if it can do that, necessarily it can make such carrier liable to all of its employees."

On the other hand, the same brief insists that these propositions are irrelevant, because the statute may be interpreted so as to confine its operation wholly to interstate commerce, or to means appropriate to the regulation of that subject, and hence relieves from the necessity of deciding whether, if the statute could not be so construed, it would be constitutional. In the oral discussion at bar this latter view was earnestly insisted upon by the Attorney General. Assuming, as we do, that the propositions are intended to be alternative, we disregard the order in which they are pressed in argument, and therefore pass for a moment the consideration of the proposition that the statute is constitutional though it includes all the subject which we have found it to embrace, in order to weigh the contention that it is susceptible on its face of a different meaning from that which we have given it, or that such result can be accomplished by the application of the rules of interpretation which are relied upon.

So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and that the words "any employee," as found in the statute, should be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But, if we could bring ourselves to modify the statute by writing in the words suggested, the result would be to restrict the operation of the act as to the District of Columbia and the territories. We say this because, immediately preceding the provision of the act concerning carriers engaged in commerce between the states and territories, is a clause making it applicable to "every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States." It follows, therefore, that common carrier in such territories, even although not engaged in interstate commerce, are, by the act, made liable to "any" of their employees, as therein defined. The legislative power of Congress over the District of Columbia and the territories being plenary, and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read, "any employee when engaged in interstate commerce," we should restrict the act as to the Dis-

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trict of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy.

The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153, and authorities there cited.

As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. On this subject the opinion in the *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550, where an act of Congress concerning trademarks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The court said (p. 99):

"If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwillingly to do, namely, make a trademark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. *Cooley*, Const. Lim. 178, 179; *Com. v. Hitchings*, 5 Gray, 482."

3. It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes

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that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be under their control so long as the Constitution endures.

4. Reference was made to the report of a committee submitted to the House of Representatives on the coming in of the bill which finally became the act in question. We content ourselves on this subject with saying that that report, we think, instead of adding force to the argument that the plain terms of the act should be disregarded, tends to the contrary. And the same observation is appropriate to the reference made to the text of the safety appliance act of March 2, 1892 [27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174], which, it is insisted, furnishes a guide which, if followed, would enable us to disregard the text of the act. We say this because the face of that act clearly refutes the argument based upon it. It is true that the act, like the one we are considering, is addressed to every common carrier engaged in interstate commerce, but this direction is followed by provisions expressly limiting the scope and effect of the act to interstate commerce, which are wholly superfluous if the argument here made concerning the statute before us be sound.

We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the statute, if regarded as otherwise valid, to the due process clause of the 5th Amendment to the Constitution, because the act classifies together all common carriers. Although we deem it unnecessary to consider that subject, it must not be implied that we question the correctness of previous decisions noted in the margin,[†] wherein state statutes were held not to be repugnant to the 14th Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant. We further deem it unnecessary to express an opinion concerning the alleged repugnancy of the statute to the 7th Amendment, because

[†]Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

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of the provision of the act as to the power of the jury. In saying this, however, we must not be considered as intimating that we think the provision in question is susceptible of the construction placed on it in argument, or that, if it could be so construed, it would be constitutional.

Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable; and the judgments below are, therefore, affirmed.

MR. JUSTICE DAY concurs in this opinion.

MR. JUSTICE PECKHAM, concurring:

I concur in the result of the foregoing opinion, but I am not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant.

I concur in the proposition that, as to traffic or other matters within the state, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all that it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it.

I am authorized to state that the CHIEF JUSTICE and MR. JUSTICE BREWER agree in this view.

MR. JUSTICE MOODY, dissenting:

I am unable to agree in the judgment of the court. Under ordinary circumstances, where the judgment rests exclusively, as it does here, upon a mere interpretation of the words of a law, which may be readily changed by the lawmaking branches of the government, if they be so minded, a difference of opinion may well be left without expression. But where the judgment is a judicial condemnation of an act of a co-ordinate branch of our government, it is so grave a step that no member of the court can escape his own responsibility, or be justified in suppressing his own views, if unhappily they have not found expression in those of his associates. Moved by this consideration, and solicitous to maintain what seems to me the lawful powers of the nation, I have no doubt of my duty to disclose fully the opinions which, to my regret, differ in some respects from those of some of my brethren.

The only question which these cases present is the constitutionality of the employers' liability act, which, briefly stated, provides a remedy for the injury or death of the employees of territorial, interstate, and foreign common carriers, caused by the negligence of the carrier. The defendants were both interstate carriers, and these actions were brought to recover for the deaths of their employees who, at the time, were engaged in interstate transportation. The judgment of the court does not

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deny that it is within the power of the Congress to provide a remedy for the injury or death of employees engaged in the conduct of territorial, interstate, and foreign commerce. It rests upon the ground that this statute is unconstitutional because it seeks to do more than that, and regulates the liability of employers while engaged in intrastate commerce or in manufacture. At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the states, and that I understand that to be the opinion of every member of the court.

The constitutionality of the act was attacked in the arguments before us upon three grounds: First, because it seeks to control by provisions so inseparable that they are incapable of resolution into their several parts, not only the territorial, foreign, and interstate business of carriers, but also their intrastate business, which, by the Constitution is reserved for the government of the states. Second, because, if the act should be interpreted as not intruding upon the domain of the states by directly regulating commerce exclusively within the states, yet, that legislation fixing the obligation of employers engaged in interstate and foreign commerce to their employees in such commerce, for injuries suffered by the latter in the course of the employment, is not the regulation of commerce, and, therefore, is not within any power conferred by the Constitution upon Congress. Third, because, even if the act is concerned with a subject which is within the power of Congress, yet the specific changes made by it in the common-law rules governing the relations of employer and employee exceed the legislative power or violate the constitutional prohibitions which restrict that power.

I am of the opinion that the act is not open to any of the constitutional objections urged against it, and shall consider all of the objections in the order in which I have stated them.

In the consideration of the scope of the statute for the purpose of determining whether it seeks to control that part of commerce which is beyond the power of Congress and subject only to the government of the states, it is to be observed that the opening words of Congress are in recognition of the limitation of its authority and of the constitutional distinction between commerce among the states and with foreign nations on the one hand and commerce within the states on the other hand. The commands of the law are addressed only to "common carriers engaged in trade and commerce" in the territories, with foreign nations, and among the states, and with respect to carriers engaged in commerce within the states the law is impressively silent. The expression and enumeration of the parts of commerce which are clearly within the control of Congress is equivalent to an exclusion of the part which is not within its control. In the careful selection of the language of this law the legislators may well have in mind the words of Chief Justice Marshall which have

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received the constant approval of this court. He said (in *Gibbons v. Ogden*, 9 Wheat. 194, 195, 6 L. ed. 69, 70) :

"The subject to which the power is next applied is to commerce 'among the several state.' * * * Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved to the state itself."

These words of the Chief Justice have been regarded as delimiting accurately the constitutional boundaries of the respective powers over commerce of the nation and the states. They have been frequently repeated, and, though differences have arisen in their application to the complicated affairs of mankind, never doubted, and universally approved. It is not easy to believe that Congress intended to dispute their authority. The reasoning which was thought worthy for the interpretation of the Constitution will not be misapplied if it be employed in the interpretation of a law passed in pursuance of the powers conferred by the Constitution. Why should it not be said of the law as it was said of the Constitution, that "the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, * * * must be the exclusive internal commerce of the state." From the enumeration of territorial, interstate, and foreign commerce, and the omission of the internal commerce of the state, is

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deny that it is within the power of the Congress to provide a remedy for the injury or death of employees engaged in the conduct of territorial, interstate, and foreign commerce. It rests upon the ground that this statute is unconstitutional because it seeks to do more than that, and regulates the liability of employers while engaged in intrastate commerce or in manufacture. At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the states, and that I understand that to be the opinion of every member of the court.

The constitutionality of the act was attacked in the arguments before us upon three grounds: First, because it seeks to control by provisions so inseparable that they are incapable of resolution into their several parts, not only the territorial, foreign, and interstate business of carriers, but also their intrastate business, which, by the Constitution is reserved for the government of the states. Second, because, if the act should be interpreted as not intruding upon the domain of the states by directly regulating commerce exclusively within the states, yet, that legislation fixing the obligation of employers engaged in interstate and foreign commerce to their employees in such commerce, for injuries suffered by the latter in the course of the employment, is not the regulation of commerce, and, therefore, is not within any power conferred by the Constitution upon Congress. Third, because, even if the act is concerned with a subject which is within the power of Congress, yet the specific changes made by it in the common-law rules governing the relations of employer and employee exceed the legislative power or violate the constitutional prohibitions which restrict that power.

I am of the opinion that the act is not open to any of the constitutional objections urged against it, and shall consider all of the objections in the order in which I have stated them.

In the consideration of the scope of the statute for the purpose of determining whether it seeks to control that part of commerce which is beyond the power of Congress and subject only to the government of the states, it is to be observed that the opening words of Congress are in recognition of the limitation of its authority and of the constitutional distinction between commerce among the states and with foreign nations on the one hand and commerce within the states on the other hand. The commands of the law are addressed only to "common carriers engaged in trade and commerce" in the territories, with foreign nations, and among the states, and with respect to carriers engaged in commerce within the states the law is impressively silent. The expression and enumeration of the parts of commerce which are clearly within the control of Congress is equivalent to an exclusion of the part which is not within its control. In the careful selection of the language of this law the legislators may well have in mind the words of Chief Justice Marshall which have

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received the constant approval of this court. He said (in *Gibbons v. Ogden*, 9 Wheat. 194, 195, 6 L. ed. 69, 70):

"The subject to which the power is next applied is to commerce 'among the several state.' * * * Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

"It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved to the state itself."

These words of the Chief Justice have been regarded as delimiting accurately the constitutional boundaries of the respective powers over commerce of the nation and the states. They have been frequently repeated, and, though differences have arisen in their application to the complicated affairs of mankind, never doubted, and universally approved. It is not easy to believe that Congress intended to dispute their authority. The reasoning which was thought worthy for the interpretation of the Constitution will not be misapplied if it be employed in the interpretation of a law passed in pursuance of the powers conferred by the Constitution. Why should it not be said of the law as it was said of the Constitution, that "the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, * * * must be the exclusive internal commerce of the state." From the enumeration of territorial, interstate, and foreign commerce, and the omission of the internal commerce of the state, is

not clear that the commerce which is exclusively internal to the state, and does not affect any other character of commerce, was intended to be outside the purview of the law? Does not a proper respect for the acts of Congress and the strong presumption that it will not exceed its powers, so frequently declared by this court, require us to believe that, when the kinds of commerce within its undoubted control are carefully enumerated, all the words of the law, however general, are to be referred solely to that commerce and no other?

If carriers were separated by a clear line of division, so that one class were engaged exclusively in interstate and foreign commerce, and the other class were engaged exclusively in commerce within the states, it would not, of course, occur to any mind that this act had any reference whatever to the state carriers. But there is no such hard and fast line of division. Carriers often, and, where they are railroads, usually are, as a matter of fact, engaged both in interstate and foreign commerce, over which Congress has the control, and intrastate commerce, over which the states have the control. Applying the law under consideration to the conditions as they actually exist, it is said that its words are so general and sweeping as to comprehend within its benefits not only the employees of the interstate carrier, engaged in the business of interstate carriage, but also the employees of the same carrier engaged in the business of intrastate carriage which it may and usually does conduct. Counsel illustrated their argument by suggesting that if a carrier doing an interstate business on the Pacific slope also conducted a local trolley line wholly along the Atlantic seaboard within a single state, an employee on the local trolley line would, by the terms of this act, be entitled to its benefits. If such be the necessary interpretation of the statute, plainly it exceeds the power of Congress, for Congress certainly has no right to regulate the purely internal commerce of a state. Nor can the statute be saved by rejecting that part of it which is unconstitutional, because its provisions are single and incapable of separation. The vicious part, if such exist, is so intermingled with that which is good that it cannot be eliminated without destroying the whole structure.

Which interpretation, then, should be adopted? That which regards the law as prescribing the liability of the carrier only to those employees who are engaged in the work of interstate and foreign commerce, or that which extends the benefits of the law also to those employees engaged in work which has no relation whatever to such commerce? In answering this question it must not be forgotten that, if the latter interpretation be adopted, in the opinion of the whole court the act is beyond the constitutional power of Congress. That is a consideration of vast importance, because the court has never exercised the mighty power of declaring the acts of a co-ordinate branch of the government void except where there is no possible and sensible construction

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of the act which is consistent with the fundamental organic law. The presumption that other branches of the government will restrain themselves within the scope of their authority, and the respect which is due to them and their acts, admits of no other attitude from this court. This is more than a canon of interpretation, it is a rule of conduct resting upon considerations of public policy, and, in the exercise of the delicate function of condemning the acts of co-ordinate and equal branches of the government, under the same obligation to respect the Constitution as ourselves, has been observed from the beginning. I regard the rule as so vital and fundamental in this and all other parts of the case that I select almost at random some expressions of it by different justices of this court. When the power to declare an act of Congress void was still undecided, Mr. Justice Chase said in *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556, p. 175: "If the court have such power, I am free to declare that I will never exercise it, but in a very clear case." Mr. Justice Strong said in *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287, p. 531: "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress, to show clearly that it is in violation of the provision of the Constitution. It is not sufficient for them that they succeed in raising a doubt." In *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550, Mr. Justice Miller said, p. 96: "When this court is called on, in the course of the administration of the law, to consider whether an act of Congress, or any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty." In *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522, Mr. Justice Peckham said, p. 514: "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The Presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest." Mr. Justice White in *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, said, p. 492: "In examining the statute in order to determine its constitutionality, we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears." Mr. Chief Justice Waite in *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, said, p. 718: "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor

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of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. . One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Justice Story, in *United State v. Coombs*, 12 Pet. 72 9 L. ed. 104, said, page 76: "If the section admits of two interpretations, one of which brings it within and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

Citations of this character might be multiplied, but to no good purpose. There is no doubt that the rule exists, there is no doubt that it is wise, and promotes the mutual respect between the different branches of the government which is so essential to the welfare of all, and that it requires us, if it is within our power, to give to the words of the statute before us a meaning which will confine its provisions to subjects within the control of Congress. If two interpretations are possible our plain duty is to adopt that which sustains the statute as lawful exercise of authority, and not that which condemns it as a usurpation.

The argument which supports a construction of the statute which would include within its provisions intrastate commerce is readily stated. It is said that "every common carrier" engaged quite easy, quite reasonable, and, in my opinion, quite necessary in territorial, foreign, or interstate trade, is made "liable to any of its employees * * * for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect" in its instrumentalities, and that, as there is no qualification of or exception to the generality of the language descriptive of the employees or instrumentalities, it must be deemed to include those engaged and used solely in intrastate commerce, and even in manufacture, as well as those engaged and use in other commerce. But I venture to think that this argument rests upon too narrow ground. It contemplates merely the words of the statute; it shuts out the light which the Constitution sheds upon them; it overlooks the significance of the enumeration of the kinds of commerce clearly within the national control and the omission of the commerce beyond that control,—and enumeration and omission which characterizes, colors, and restrains every word of the statute,—and it neglects the presumptions in favor of the validity of the law and of the obedience of Congress to the commands of the Constitution, which cannot with propriety be disregarded by this court. Taking into account these missing aids to construction, it becomes quite easy, quite reasonable, and, in my opinion, quite necessary, to construe the act as conferring its benefits only upon employees engaged in some fashion in the commerce which is enumerated

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in it and is undoubtedly under the control of Congress. Even without these guides for discovering the intent of Congress, which the uniform practice of the court compels us to use, it is natural to suppose that, when territorial, interstate, and foreign carriers only are mentioned and every such carrier is declared to be liable "to any of its employees," only its employees in such commerce are intended. With those guides the conclusion appears to me irresistible, for they show that if the words, "any of its employees," in the context where they are used, are capable of meaning all of the employees upon any kind of work, yet their generality should be restrained so as to include only those who are subject to the power of the lawmaking body. The case of *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134, is precisely in point here. An act of the general assembly of the state of Virginia provided for refunding the state debt by the issue of coupon bonds for two thirds of the total amount of that debt. It was enacted that the coupons should "be receivable at and after maturity for all taxes, debts, dues, and demands due the state." There was at the time of the passage of the refunding act a provision of the Constitution of Virginia requiring all school taxes to be paid in cash, and it had been held by this court that the constitutional provision disabled the Virginia legislature from providing that the coupons should be receivable for such taxes. *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972. The argument was then made that as the statute providing for the receivability of the coupons for "all taxes, debts, dues, and demands on the state" was in part beyond the constitutional power of the legislature, the contract evidence by that statute was entirely void. The court, speaking by Mr. Justice Brewer, answered this argument by saying, p. 112: "It ignores the difference between the statute and the contract, and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which, under the existing provisions of the state Constitution, could not be affected by legislative action, the statute is

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to be read as though it in terms excluded them from its operation." The language quoted was not *obiter*. The case turned upon the construction of the statute and reversed the construction by the highest court of the state of its own statute, as well as its judgment that the statute thus construed was inconsistent with the state Constitution, because "all taxes" include taxes beyond the power of the legislature. I am unable to reconcile the judgment in that case with the conclusion which is reached by the court in this. The reasoning which, in that case, led the court to construe a statute providing that the coupons should be receivable for "all taxes" to mean only for such taxes as the legislature had the constitutional power to declare payable in such a manner, is equally potent to lead the court, in the case at bar, to construe a statute providing for the liability of the interstate and foreign carrier to "any of its employees" to mean only to any of its employees for whom Congress has the constitutional power to make such a provision. In that case there were taxes within the legislative control, and taxes without the legislative control of the Virginia assembly; in this case there are employees within the legislative control and employees without the legislative control of Congress; in that case the statute provided for "all taxes;" in this case the statute provides for "any employees;" in that case, examining the statutes "in the light of the Constitution," this court declared that "however broad and general its language, it cannot be interpreted as extending beyond those matters which it is within the constitutional power of the legislature to reach," and if it appears that there were taxes beyond the control of the legislature, that the statute should be read "as though it in terms excluded them from its operation;" I am unable to imagine any reason why, examining the statute in this case with the aid of the same light, the court should not make the same declaration of its meaning. Moreover, it should be remembered that a circumstance leading in the same direction is present in the case at bar which was absent in that case, for, to repeat what has already been said, here the general words are used in a context which suggests, if it does not require, the less extended meaning.

It should be observed that the McCullough Case was simply a case of construction. The court made no judicial amendment of the statute or exception from its provisions of any subject which came within them according to their proper meaning, ascertained with the aid of the light of the constitutional limits of the legislative power. Mr. Justice Brewer pointed out the distinction between the construction of the statute and its validity, saying: "The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes." Thus the case is distinguished from some others, much relied upon in the argument, which establish the proposition that a single statutory provision is void if it is expressed in general words so used

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as to manifest clearly the intention to include within those words subjects beyond the constitutional power of the lawmaking body. The courts have no power to read into such a provision an exception for the purpose of saving that which is left from condemnation. A law which cannot endure the test of the Constitution without judicial amendment must perish. *United States v. Reese*, 92 U. S., 214, 23 L. ed. 563; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; *Lee Illinois, C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153. But the rule derived from these cases is by no means decisive of the inquiry whether this statute must be construed as seeking to accomplish objects beyond the power of Congress. It can be made decisive only by begging the very question to be determined, and, in the words of Mr. Justice Brewer, confusing "the two entirely distinct matters of construction and validity." It merely expresses the judicial duty which arises after the question of construction is determined. A critical examination of the case shows that in each of them, in the opinion of the court the language of the statute admitted of no possible interpretation, except that Congress intended to deal, by a single and inseparable provision, with subjects without as well as subjects within its control. As was said in one of them (*United States v. Reese*, 92 U. S. 220, 23 L. ed. 565), there was "no room for construction unless it be as to the effect of the Constitution." It would be unprofitable to dwell upon all these decisions, and I content myself with the analysis of one, and that the one deemed by counsel who rely upon it as the most important and conclusive. In "*The Trade-Mark Cases*" it appeared that, in the act entitled, "An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights" [16 Stat. at L. 198, chap. 230], provision was made for the registration of trademarks in the Patent Office. Some years later an act was passed providing for the punishment by fine and imprisonment of any person making fraudulent use of or counterfeiting trademarks thus registered. The cases were indictments under this later act, and the question for decision was its constitutionality. The act was supported first upon the ground that it was authorized by that part of the Constitution which confers upon Congress the authority "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The court, after saying "that it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution," and that "it was mainly, if not wholly, to this clause that the advocates of the law looked for its support," held

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that this clause was not a sufficient source of authority for the act. The act was supported, second, upon the ground that the commerce clause of the Constitution supplied the requisite authority to Congress. But there was not a word in the act from which it could be inferred that Congress intended to exercise the power conferred by the commerce clause. The court, by Mr. Justice Miller, after pointing out that commerce within a state was beyond the control of Congress, said: "When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes." Words could not be more happily chosen than these, to describe what the statute in the case at bar is on its face and from its essential nature. The Justice then proceeds to say: "If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress." No words could be more happily chosen than these, to describe exactly what the statute in the case at bar is not. The court, then, taking the view, upon which there cannot be two opinions, that the act intended to establish a universal system of trademark legislation applicable to all commerce, held the statute void, saying: "It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." The reasoning relied upon in this case to overthrow the statute, if applied to the statute before us, tends to support it.

I do not wish to be understood as saying that the group of cases I am now discussing does not furnish instances where the court has declined to limit the meaning of words in order to have the act. I only say that, in these cases, it could not be done without violating the obvious intent of Congress, as ascertained by the necessary meaning of the language it employed; in other words, that in these cases only one interpretation was possible, and there was "no room for construction." They cannot be understood as deciding that general words may not, in view of the context where they are found, and, with the aid of the light of the Constitution, be restrained in their meaning, with the purpose and effect of giving them such a construction that the act may be sustained as a legitimate exercise of the legislative power. If they should be so understood they would be in flat conflict with the *McCullough Case*, and with the spirit of the interpretation that prevailed in *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471, and *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511. In the former case it was held that an act which punished certain offenses committed

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by "any person or persons" upon the high seas should not be construed as including persons who might commit such offenses on board a vessel belonging to the subjects of a foreign state; Marshall, Ch. J., saying: "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." In the latter case it was held that an act that forbade all persons from assisting the migration into the United States of "any alien or aliens, any foreigner or foreigners," under contract "to perform labor or services of any kind," did not include a minister of religion, though such a person was within the letter of the statute. These cases show that we may with propriety give to the words "any of its employees" the narrower meaning, and, because such meaning saves the act from condemnation, it is, I believe, our imperative duty to adopt it. No words need to be read into the act. It is required only that the words already there shall be applied to that commerce which Congress referred to; namely, territorial, foreign, and interstate. Thus read, the whole statute is saved and no part of it is destroyed.

The natural meaning of the words of the statute considered together, each word receiving significance from those with which it is allied, the respect which is due to Congress, the belief which I hold that it would not intentionally overstep the clearly defined limits of its authority, and the principles of construction heretofore acted upon by this court, lead my mind to the settled conviction that the statute can be interpreted, and ought to be interpreted, as affording the remedy therein prescribed only to the employees of foreign, interstate, and territorial carriers, who are themselves engaged in some capacity in such commerce in some of its manifold aspects. If this meaning be attributed to the words of the law, it is apparent that, in the opinion of a majority of the court, the law, in its main features at least, would be constitutional.

Entertaining these views of the meaning of the statute, I am compelled to go further and consider the other objections to it. I agree entirely with all that was said in the opinion of Mr. Justice White in support of the power of the Congress to enact a law of this general character, but, as I think that the judgments in these cases ought to be reversed, I cannot escape dealing with specific objections to the statute which he has not deemed it necessary to discuss. I think it better, therefore, to deal with all the questions that are necessarily raised in these cases.

I come now to the question whether the statute, thus construed, is in the execution of any power conferred by the Constitution upon the Congress. It is apparent that there is no such power unless it be found in that clause of the Constitution which authorizes Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes." It

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hardly needs to be said that the inability of the national government created by the Articles of Confederation to deal effectively with commerce was one of the efficient causes of the call for the constitutional convention. No doubt the most urgent need of that time was a central government with powers adequate to control foreign commerce, but interstate commerce was not overlooked, though its principal importance then consisted in its relation to foreign commerce. Federalist, No. 42, by Mr. Madison. No one could then have foreseen the extent of the interstate commerce of our times, for no one could fortell the employment of the forces of steam and electricity which have so wonderfully aided its development. But the statesmen of that time, confident of the future, and hopeful that they might devise a government which would endure, must have understood that the commerce which concerned more than one state, from its essential nature, was in part outside the territorial jurisdiction of any state, could not be governed efficiently by a single state, and, if left outside of the national control, would be subject to woeful embarrassment by the conflicting regulations of the several states into which it entered. It appears in the reports of the debates that these dangers were appreciated by the members of the convention, so far as they threatened that part of the commerce among the states which was conducted by water transportation, then the only part of such commerce of sufficient importance to attract public attention. But fortunately the spirit of the nation builder, and not of the codemaker, inspired and dominated the convention. Its members were not content to frame a system of laws sufficient for the present moment, which might, in a few years, become unsuited to, or inadequate for, the needs of the people. They undertook, rather, the task of devising a scheme of government, and of allotting the powers usually exercised by governments between the existing states and the prospective nation. Whenever such a power came under consideration its nature was examined, and it was then placed in the hands of that governmental agency which it was supposed could exercise it most advantageously. This very power furnishes a signal illustration of the method pursued. The convention did not determine how interstate commerce should be regulated, but rather who should regulate it, and left, with certain limitations, the necessity, extent, and nature of the regulation to the contemporaneous knowledge, wisdom, and discretion of the body in whom the power was vested. We may well believe that, contemplating the subject with the enlarged vision of those who are building for a future unknown or dimly discerned, and seeing clearly that interstate, like foreign, commerce, was, in the words of the resolutions with which Randolph opened the deliberations of the convention, a matter "to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," the convention was constrained to associate the two together in every draft of the Constitution proposed, and place them with the

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Indian trade, under the control of the national legislature. Madison's Journal, Scott's ed. pp. 67, 161, 164, 185, 362, 453, 654, 656, 704, 753.

The different kinds of commerce described have the common qualities that they are more extensive than the jurisdiction of a single state and liable to injury from conflicting state laws, and thereby are all alike distinguished from the purely internal commerce of the states. There is nothing in the words of the grant that permits the belief that the power is not coextensive over foreign, interstate, and Indian trade, or is anything less than the whole power which any government may properly exercise over either, though it may well be that the restrictive parts of the Constitution, its prohibitions and reservations, may operate differently on different kinds of commerce, or even on different aspects of the same kind of commerce.

It is said that Congress has never before enacted legislation of this nature for the government of interstate commerce on land, though it has for the government of such commerce upon the water for the government of foreign commerce; that, on the contrary, the relations affected have been controlled by the undoubted power of the states to govern men and things within their respective dominions; and that this omission of Congress is of controlling significance. The fundamental fallacy of this argument is that it misunderstands the nature of the Constitution, undervalues its usefulness, and forgets that its unchanging provisions are adaptable to the infinite variety of the changing conditions of our national life. Surely, there is no statute of limitations which bars Congress from the exercise of any of its granted powers, nor any authority, save that of the people whom it represents, which may, with propriety, challenge the wisdom of its choice of the time when remedies shall first be applied to what it deems wrong. It cannot be doubted that the exercise of a power for the first time may be called upon to justify itself. The fact that it is for the first time is a circumstance to be considered. But in this case it is a circumstance whose significance disappears in the light of history. Henry Adams, a writer of high authority, in the first chapter of his History of the United States, has drawn a vivid picture of the conditions of our national life at the beginning of the nineteenth century. The center of population was near Baltimore. The interior was almost impenetrable except by the water ways and two wagon roads from Philadelphia to Pittsburg and from the Potomac to the Monongahela. The scattered settlements of what was then the Western country were severed from the seaboard settlements by mountain ranges, and there was little connection between the two almost independent peoples. There was scarcely a possibility of trade between the states except along the sea-coast and over the dangerous and uncertain rivers. "The experience of mankind," says the author, p. 7, "proved trade to be dependent on water communications, and as yet Americans did not dream that the experience of mankind was useless to them."

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We need not look beyond these conditions for an explanation why Congress, though it early and vigorously exercised its power of legislation over foreign commerce and interstate commerce by water, left it unused in respect to interstate commerce on the land. As population multiplied, bringing the isolated settlements nearer to each other, wealth increased, creating a wider demand for commodities, and roads and bridges came to be better and more numerous, doubtless overland commerce was somewhat stimulated. But the iron restrictions which nature had placed upon land transportation remained constant until they were unloosed by the operation of the steam railroad. The system of steam transportation began modestly by the construction of short lines, often wholly within a single state. These lines were lengthened by extensions and consolidations, until at the present time the states of the Union are all bound together by a network of interstate railroads. Their operation, aided by the quick and cheap transmission of the mails, and the communication of intelligence by electricity, has transformed the commerce of the country. Interstate commerce by land, once so slight as to be unworthy of the attention of the national legislature, has come to be the most important part of all trade, and it is not too much to say that the daily needs of the factory and the household are no longer dependent upon the resources of the locality, but are largely supplied by the products of other states.

It was not reasonably to be expected that a phenomenon so contrary to the experience of mankind, so vast, so rapidly developing and changing, as the growth of land commerce among the states, would speedily be appreciated in all its aspects, or would at once call forth the exercise of all the unused power vested in Congress by the commerce clause of the Constitution. Such a phenomenon demands study and experience. The habit of our people, accentuated by our system of representative government, is not so much in legislation to anticipate problems as it is to deal with them after experience has shown them to exist. So Congress has exercised its power sparingly, step by step, and has acted only when experience seemed to it to require action. A description of its action in this respect was given in *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, where it was said, p. 579: "Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by, for the present, all that legislation in respect to commerce by water, and considering only that which bears upon railroad interstate transportation (for this is the specific matter involved in this case), these acts may be noticed: First. That of June 15th, 1866, chap. 124, 14 Stat. at L. 66, carried into the Revised Statutes as § 5258 (U. S. Comp. Stat. 1901, p. 3564), which provides: 'Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several states, to establish post roads, and to raise and support armies: Therefore, be it enacted by the Senate and House of Representatives of the United States of Amer-

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ica in Congress assembled, that every railroad company in the United States whose road is operated by steam, its successors and assigns be, and is hereby, authorized to carry upon and over its roads, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination.' Second. That of March 3d, 1873, chap. 252, 17 Stat. at L. 584. (Rev. Stat. §§ 4386 to 4389, U. S. Comp. Stat. 1901, pp. 2995, 2997), which regulates the transportation of live stock over interstate railroads. Third. That of May 29th, 1884, chap. 60, § 6, 23 Stat. at L. 31, 32, U. S. Comp. Stat. 1901, pp. 299, 3184, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4th, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, with its amendments of March 2d, 1889, chap. 382, 25 Stat. at L. 855, U. S. Comp. Stat. 1901, p. 3158, and February 10th, 1891, chap. 128, 26 Stat. at L. 743, U. S. Comp. Stat. 1901, p. 3163, known as the 'interstate commerce act,' by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the 16th section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1st, 1888, chap. 1063, 25 Stat. at L. 501, providing for arbitration between railroad interstate companies and their employees. And, sixth, the act of March 2d, 1893, chap. 196, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions."

Since this decision other laws more fully regulating interstate commerce on land have been enacted, which need not here be stated. They show a constantly increasing tendency to exercise more fully and vigorously the power conferred by the commerce clause. It is well to notice, however, that Congress has assumed the duty of promoting the safety of public travel by enacting the safety appliance law; an act to require reports of casualties to employees or passengers (31 Stat. at L. 1446, chap. 866, U. S. Comp. Stat. 1901, p. 3176); a resolution directing the Interstate Commerce Commissions to investigate and report on the necessity for block signals (34 Stat. at L. 838, U. S. Comp. Stat. Supp. 1907, p. 912); an act limiting the hours of service of employees; and the act under consideration. These acts, all relating to interstate transportation, demonstrate the belief of Congress that the safety of interstate travel is a matter of national concern, and its deliberate purpose to increase that safety by laws which it deems conducive to that end. I think, therefore, that we may consider whether this act finds authority in the commerce clause of the Constitution without embarrassment from any inferences which may be drawn from the inaction of Congress.

It is settled beyond the necessity of citing cases that the trans-

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portation of persons and property is commerce; in other words, that the business of carriers is commerce. Where, therefore, the business is foreign or interstate, Congress, it has frequently been decided, has the paramount, if not the sole, power to legislate for its direct control. An obstruction of such commerce by unlawful violence may be made punishable under the laws of the United States, suppressed by the armies of the United States, or, at the instance of the United States, enjoined in its courts. *Re Debs, ubi supra*. It is difficult to conceive how legislation may effectively control the business if it cannot regulate the conduct of those engaged in the business, while engaged in the business, in every act which is performed in the conduct of the business. The business of transportation is not an abstraction. It is the labor of men, employed, with the aid of instrumentalities, animal and mechanical, in carrying men and things from place to place. In every form of transportation, from the simplest to the most complex, whether the man carries the burden on his back, or drives an animal which carries it, or a locomotive which draws a car which carries it, the one and only constant factor is the labor of mankind. I am quite unable to understand the contention made at the bar that the power of Congress is to regulate commerce among the states, and not to regulate persons engaged in commerce among the states, for, in the case of transportation, at least, the labor of those engaged in it is commerce itself. How poor and meager the power would be if, whenever it was exercised, the legislator must pause to consider whether the action proposed regulated commerce or merely regulated the conduct of persons engaged in commerce. The contention derives some plausibility from its vagueness. Of course, the power to regulate commerce does not authorize Congress to control the general conduct of persons engaged therein, but, unless it is an idle and useless power, it authorizes Congress to control the conduct of persons engaged in commerce in respect to everything which directly concerns commerce, for that is commerce itself. It would seem, therefore, that when persons are employed in interstate or foreign commerce, as the employment is an essential part of that commerce, its terms and conditions, and the rights and duties which grow out of it, are under the control of Congress, subject only to the limits on the exercise of that control prescribed in the Constitution. This has been the view always expressed or implied by this court. In his concurring opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, Mr. Justice Johnson said, p. 229: "Commerce, in its simplest signification, means an exchange of goods: but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities and enter into commerce: the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulations." In *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996, the court, in holding *inter alia* that a regulation of pilots is a regulation of commerce within the meaning of the commerce

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clause, said (p. 316 by Justice Curtis) of the power: "It extends to the persons who conduct it as well as to the instruments used." In the opinion of the court, delivered by Mr. Justice Field, in *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, it was said: "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on." In delivering the opinion of the court in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, where a state statute requiring interstate locomotive engineers to obtain a license after a qualifying examination, and imposing a penalty for operating without such license, was sustained, Mr. Justice Matthews said: "It would, indeed, be competent for Congress to legislate upon its subject-matter and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce." In sustaining a similar state statute, directed against color blindness, Mr. Justice Field said, in *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce, and that such legislation will supersede any state action on the subject. But, until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains." In *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289, a state statute forbidding a contract limiting liability for injury was sustained, the court, by Mr. Justice Gray, saying: "The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits." This statement was assumed to be true in *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, and *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100. The case of *Peirce v. Van Dusen*, 69 L. R. A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693, was decided by the court of appeals of the sixth circuit by Mr. Justice Harlan and Judges Taft and Lurton. The opinion was delivered by Mr. Justice Harlan. After sustaining a state statute which modified the common-law rules with respect to the liability for injuries of a carrier to its

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employees, he said of it: "The Ohio statute is not applicable alone to railroad corporations of Ohio, engaged in the domestic commerce of this state. It is equally applicable to railroad corporations doing business in Ohio, and engaged in commerce among the states, although the statute, in its operation, may effect in some degree a subject over which Congress can exert full power. The state may do many things affecting commerce with foreign nations and among the several states until Congress covers the subject by national legislation. * * * Undoubtedly the whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states."

We may not trust implicitly to the accuracy of statements gathered from opinions where the precise question was not for decision. But where, as in these quotations, the statements were an essential part of the course of reasoning deemed appropriate for the disposition of the cases, where the same thought, clothed in different words, has been expressed at intervals from early times to the present day, and where no decision or judicial utterance has been found in opposition to them, they are entitled to profound respect, and furnish cogent evidence of what the law has always been supposed to be by the members of this court. They cannot be regarded lightly, and if we follow them they lead us to the conclusion that the national power to regulate commerce is broad enough to regulate the employment, duties, obligations, liabilities, and conduct of all persons engaged in commerce with respect to all which is comprehended in that commerce. Upon what principle except this could this court have twice enforced the safety appliance act, undisturbed by a doubt of its constitutionality? *Johnson v. Southern P. Co.*, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407. That act (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174) compelled interstate railroads to equip all their trains with power brakes operated from the engine, and all their cars with automatic couplers, grab irons, and hand holds, by enacting that the use of engines and cars not thus equipped should be unlawful. There was no express provision that an employee injured by the failure of a railroad to comply with the law should be entitled to damages, but without doubt the liability of the railroad is implied. The common-law rule governing the liability was materially changed by § 8, which abolished in part the doctrine of the assumption of risk, by providing that the employee should "not be deemed to have assumed the risk" of the unlawful conditions, though he knew of them and continued in his employment. This section was enforced in most emphatic manner in the *Schlemmer Case*, where Mr. Justice Holmes said: "An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person

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injured was a fellow servant of the negligent man." If the statute now before us is beyond the constitutional power of Congress, surely the safety appliance act is also void, for there can be no distinction in principle between them. If Congress can create a liability to an injured employee for the existence of conditions in certain mechanisms which he uses, by declaring those conditions unlawful, it may create the same liability for negligence of the agents and imperfections in the instruments used in the carrier's work; if it may change the common-law rule of the assumption of the risk of imperfect appliances, it may change the rule of the assumption of the risk of a careless fellow servant. I can conceive of no principle of constitutional law which enables us to say that the commerce clause authorizes Congress to fix upon the carrier a liability for an insufficient brake but not for a defective rail, for the absence of automatic couplers, but not for the negligent order which brings trains into collision, for an insecure grab iron, but not for a heedless switchman. If Congress has the right to control the liability in any way it may control it in every way, subject, as all powers are subject, to the express prohibitions of the Constitution. Unless the cases on the safety appliance acts are deemed to have been inadvertently decided, they seem to be conclusive of this branch of the case. This seems to have been feared by counsel for one of the defendants, who, in his brief, said "that the giving of a right of recovery to an injured employee is a proper and necessary method for making effective the safety appliance act * * * we do not admit."

But, if we put aside the authority of precedents, and examine the nature and extent of the grant to Congress of power over commerce in the light of the settled principles of interpretation fit to be applied to the exposition of a constitution, we shall arrive at the same result. One main purpose and effect of the Constitution was to devise a scheme of efficient government. In order to accomplish this all the powers usually exercised by governments were distributed between the states and the nation, except those deemed unfit or unsafe to be intrusted to either and withheld from both. In the allotment of powers to the nation they were enumerated rather than defined. In the enumeration, words of the largest import were employed, comprehending within their meaning grand divisions of the powers of government. The nature of the Constitution, said Chief Justice Marshall (*M'Culloch v. Maryland*, 4 Wheat. p. 407, 4 L. ed 601), "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." The wide extent of the powers granted to Congress is expressed in a few simply-worded provisions, all of which might be printed on a single page of its book of annual laws. Counsel have argued that the power to regulate commerce does not include the power to regulate the conduct of persons engaged in that commerce in respect of that commerce. This is what Mr. Justice Miller (*Ex parte Yarbrough*, 110 U. S. 658, 28 L.

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ed. 276, 4 Sup. Ct. Rep. 155) described as "the old argument, often heard, often repeated, and in this court never assented to, that, when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it." Suppose that method of reasoning had been applied to the power "to establish postoffices and post roads," under which Congress governs the postal system of the country as fully and freely in every detail as it is governed by any other nation. It could be said to Congress, "You cannot carry the mail, you cannot issue money orders, you cannot determine what shall be excluded from the mail, you cannot regulate the conduct of those who are employed in the mail service, you cannot exempt them from militia duty, you cannot punish their theft or embezzlement, you cannot punish him who breaks and enters the post-office or mail car,—all these powers are reserved to the states. You can only establish postoffices and post roads, and when that is done your power is exhausted." Yet Congress has done all these things, and no one now doubts its power to do them, because the grant of power is of the whole governmental power over the subject. So, too, the power to regulate interstate and foreign commerce is the whole power which any government can exercise over that subject; it "is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Marshall, Ch. J., in *Gibbons v. Ogden*, 9 Wheat, 197, 6 L. ed. 70; *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321. We are brought, then, directly to the inquiry whether a power so extensive is a sufficient warrant for the enactment of the statute before us. By what has been called the auxiliary power, Congress may "make all laws which shall be necessary and proper for carrying into execution" its granted powers. It is settled that this provision authorizes the enactment of laws which, in the exercise of a wide discretion, Congress deems adapted to secure a legitimate end and calculated to effect any of the objects intrusted to it, and the exercise of that discretion, unless it violates some prohibition of the Constitution or is used as a pretext to accomplish some object not intrusted to the national government cannot be reviewed by the judicial branch of the government without trespassing upon a domain which is peculiarly and exclusively the province of the legislative branch. If the statute under consideration be brought to the test of these principles, there can be no doubt of its validity.

It cannot be denied that in that part of commerce which consists in transportation, the safety of those who are concerned in it as passengers or employees is of the first importance. As we said by Mr. Justice Gray, in *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 135, 42 L. ed. 690, 18 Sup. Ct. Rep. 290: "The fundamental principle on which the law of common carriers was established [was] the securing of the utmost care and diligence in the performance of their important duties to the public." The

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government having the relations which the national government has to interstate commerce, pronounced by the court in the Debs Case to be "those of direct supervision, control, and management," which neglects to do what it is fitting for a government to do to insure the safety of public travel, fails in the performance of its highest duty. The lengthening list of casualties to employees and passengers on our railroads has arrested the public attention and created public alarm. Ought Congress alone to be indifferent? Or have we so weak a system of government that the only part of it which is clothed with direct authority over the commerce in which the casualties happen is powerless? What does the "direct supervision, control, and management" amount to if it does not include the power to pass any laws really calculated to lessen the great dangers of public travel? Congress, recognizing its responsibility, and believing in its power, has enacted the group of laws to which reference has been made. Of one (the safety appliance act) the Chief Justice said, in the Johnson Case, what is true of all: "The primary object of the act was to promote the public welfare by securing the safety of employees and travelers." That act, like this, in terms simply safeguarded the employee, but his safety cannot be separated from the safety of the traveler; both may be affected by the same defect in appliances, and suffer injury in the same disaster, act of negligence and the same defect in appliances, and suffer injury in the same disaster. Any law which promotes the safety of either promotes the safety of both. Much of the law of common carriers, whether created by decisions of the courts or by acts of legislatures, has been based upon or influenced by the theory that the nature of the liabilities imposed upon the carriers directly affects the care, diligence, and safety with which they conduct their business. For instance, one consideration which has influenced the courts in the judicial development of the fellow-servant doctrine is that, by imposing upon the employee the risk of the carelessness of the men with whom he works, a greater degree of care and therefore of safety would result. The truth of this theory has been often disputed (see *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184), and it is almost universally disregarded in modern legislation. It is of no importance here whether it is right or wrong. The only significance is that the greater or less liability in damages is generally regarded as having some relation to the safety of operation. It follows that if Congress, in the exercise of its plenary power over interstate and foreign transportation, deems that the safety of that transportation would be increased by enacting that those employed in it shall have a different remedy for injuries sustained by its negligent conduct than that furnished by the laws of the states, this court cannot, without overstepping the boundary which separates the judicial from the legislative field, declare the enactment void.

The power of Congress to enact the law under consideration,

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which seems so clearly to result from a just interpretation of the commerce clause, might not have been disputed but for the fact that up to this time the subject has been left to be dealt with by the states. If a doubt ever existed that the states could lawfully deal with the subject under the general legislative authority to govern their territory, which was undisturbed by the Constitution, that doubt was dispelled by the decision in *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, and it is now agreed that the state may, in the absence of action by Congress, fix and determine the liability of all carriers while operating within the state, to those whom they employ for the injuries which are suffered in the course of the employment. But such authority in the state is not inconsistent with a like authority in the nation. Where, as in the case of our dual government, the same territories and the same individuals are subject to two governments, each supreme within its sphere, both governments, by virtue of distinct powers, may legislate for the same ends. The exercise of the rightful authority of the nation and the state, though it proceeds from different governmental powers, may reach and control the same subject. This result arises from the different relations to the community the subject may sustain; a drove of cattle may be at once interstate freight and the vehicle by which infectious disease may be brought within the borders of a state; a bridge may, at the same time, interrupt the navigation of the river, and serve as a continuation of the highways of the state; a man, while the agent through which the transaction of interstate commerce is conducted, is, at the same time, one of the population, permanent or transient, of a state, and subject to its general laws. There is no conflict in powers, though there may be conflict in legislation, referable to different powers. In such a case, under our system, the law of the state, enacted by virtue of its undoubted powers, must yield to the national law, enacted in pursuance of the powers conferred by the Constitution. There is no necessity in this case to disturb the troublesome question when, if ever, even where Congress is silent, the states may exercise any direct power over interstate and foreign commerce. For the power hitherto exercised by the states over this particular subject has never been deemed to be a regulation of commerce, but rather an exercise of their authority to regulate generally the relations of men to each other, which may indirectly affect such commerce. "If a state," said Chief Justice Marshall (in *Gibbons v. Ogden*, 9 Wheat. 204, 6 L. ed. 72), "in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state and may be executed by the same means. All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

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That the states may by their laws fix the relative rights, duties, obligations, and liabilities of all persons or corporations within their territorial jurisdiction, and thus control in that respect those who are engaged in interstate and foreign commerce; that such laws do not proceed from any power to regulate such commerce, though incidentally and indirectly they do regulate it, but are to be referred to their general power over persons and things within their territories; and that all such laws, so far as they affect such commerce, must yield to the superior authority of the laws of Congress, is, I think, conclusively shown by the following cases: *Sherlock v. Alling*, *supra*; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100; *Peirce v. Van Dusen*, 69 L. R. A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693. Upon principle and authority it, in my opinion, is clear that Congress had constitutional power over the subject with which it dealt in the statute before us.

There remains to be considered the objection that the specific provisions of the act exceed the legislative power over the subject. The powers of Congress are not only confined to those which may be inferred from the Constitution, but are also restrained by the express limits upon their exercise which are contained in that instrument. They are delegated and enumerated and then limited. Even when Congress enters upon a field in which it rightfully exercises the supreme governmental power, it is not supreme in the fullest sense. It does not enjoy complete sovereignty like that, for instance, of the British Parliament. All its legislation must obey the express commands of those parts of the Constitution which mark a limit beyond which legislation cannot go. The only limit upon the authority of Congress relevant to the discussion of this branch of the case is that which forbids Congress from depriving any person of his life, liberty, or property, without due process of law. Amendment 6. It is contended that, although the law deals with a subject under the control of Congress, it deals with it in such a manner as to violate that prohibition, and is therefore void. Before considering the contention it is desirable to state clearly the substantial provisions of the act. The remedy afforded by it is more generous to the employee than that given by the common law in several respects. The common law recognized no recovery of damages for death resulting from negligence; by the statute damages are recoverable for death as well as for injury. The common law allowed no recovery against the employer for the neglect of a fellow

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servant engaged in a common employment; by the statute the employer is held responsible for the negligence of any of its officers, agents, or employees, even though the guilty person is a fellow servant of him who is injured or killed. The common law denied to one who, by his negligence, had contributed to his own injury, the right to a remedy for the neglect of another which had been a concurring cause; by the statute the negligent sufferer may recover if his negligence be slight, and that of the employer gross in comparison, though the contributing negligence must be taken into account in reduction of the damages. The common law, as adjudged by this court, permitted the employee to enter into a contract renouncing his right to damages in case he incurred injuries in the course of his employment; the statute forbids such a contract. Thus, four doctrines of the common law restrictive of the employee's rights are supplanted by others more favorable to him.

There can be no doubt of the right of a legislative body, having jurisdiction over the subject, to modify the first three of these rules of the common law in the manner in which this act of Congress does it. They are simply rules of law, unprotected by the Constitution from change, and, like all other such rules, must yield to the superior authority of a statute. They have so generally been modified by statute that it may well be doubted if they exist in their integrity in any jurisdiction. The common-law rules have taken form through the decisions of courts, whose judges, in announcing them, were controlled by their views of what justice and sound public policy demanded. This is nowhere more clearly stated than by Chief Justice Shaw in *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, the leading American case establishing the doctrine that one cannot recover against the master for the negligence of a fellow servant, where he said: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned." But the economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well-settled doctrines of law, have no constitutional sanctity. They are binding upon succeeding judges, but, while they may influence, they cannot control legislators. Legislators have their own economic theories, their own views of justice and public policy; and their views, when embodied in a written law, must prevail. Whenever the legislative power to change any of these rules of the common law has been drawn in question in this court it has been sustained. Various state statutes allowing a remedy against a railroad employer for the negligence of a fellow servant have been held to be within the legislative power. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K.*

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& W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136. State statutes allowing a recovery for death were sustained in *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369, and *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, though the statute was attacked in the first case only on the ground that it intruded upon the admiralty jurisdiction exclusively vested in the courts of the United States, and in the second case because it interfered with interstate commerce, whose regulation was vested exclusively in Congress. Statutes of this kind have been in force in the states and doubtless in the territories for many years, many cases have been tried under them, and in no case has it ever been claimed that anything in the Constitution removes them from the legislative power. The same observation may be made, though not so emphatically, of statutes modifying the common-law rule denying a recovery to one contributing to the injury by his own neglect. It is interesting to note that this court, acting upon the same reasons which doubtless influenced Congress in the enactment of this part of the statute, established a rule in principle the same, to govern the recovery in admiralty of damages by a person injured on a ship (*The Max Morris* [*The Max Morris v. Curry*] 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29), holding that it promoted "the more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good." It is enough to say here that the decisions of the court in the safety appliance cases, supporting a statute changing the analogous common-law doctrine of assumption of risk, are in principle conclusive that the whole subject of contributory negligence is under the control of the legislative power, in this respect unrestrained by any constitutional provision. But it is earnestly urged upon us that the statute under consideration, applying to all interstate common carriers and all their employees in that business, without distinguishing between that part of the business and employment which is dangerous and hazardous and that part which is not, and confined solely to the business of common carriage and its employers, is a deprivation of the employer's property without due process of law, in violation of the 5th Amendment of the Constitution. The manner in which due process of law is said to be denied is by the denial of the equal protection of the laws by imposing unusual burdens upon a class of persons arbitrarily and capriciously selected. In support of this position cases from state courts, interpreting state constitutions, and cases from this court, interpreting the restriction upon state action imposed by the 14th Amendment, are indiscriminately cited. They furnish little aid.

It is not necessary in this case to determine how far, if at all, the requirement from the states of the equal protection of the laws, made by the 14th Amendment, is included in the requirement from the nation of due process of law, made by the 5th Amendment to the Constitution. It is enough to say that this

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statute complies with both. It is rather startling to hear that, in enacting laws applicable to common carriers alone, Congress has made a capricious and arbitrary classification. From time immemorial the common law has set apart those engaged in that business as a peculiar class, to be governed in many respects by laws peculiar to themselves. In separating carriers from those engaged in other interstate and foreign commerce, Congress has but followed the ancient classification of the common law, based upon reasons so obvious that they need no statement. Whether the law should be made to apply to all carriers or to carriers by railroad alone, or whether the employees should be classified according to the degree of danger which surrounds their employment, is a matter of legislative discretion with which we have no right to meddle. See *Missouri P. R. Co. v. Mackey*, *ubi supra*.

I have confined my observations up to this point to the first three changes in the common law made by the statute. The fourth change, that forbidding the employee to make a contract releasing his employer from the consequences of his negligence, is open to a possible objection not common to the others. It is asserted that this part of the act violates the right of free contract which in some cases this court has protected against the exercise of the legislative power. Without intimating any opinion on that subject, it is enough to say that that part of the statute is separable from and independent of the remainder, and may stand or fall by itself, and that no question concerning it is raised in these cases. I see nothing in the provision that "all questions of negligence or contributory negligence shall be for the jury" which affects the right of jury trial guaranteed by the 7th Amendment. Such questions always have been for the jury, and I cannot see that this enactment makes any change whatever.

I am of opinion, therefore, that the act should be sustained as a legitimate exercise of the authority of Congress, and that orders in these cases should be made accordingly.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE MCKENNA), dissenting:

Mr. Justice McKenna and myself are of opinion that it was within the power of Congress to prescribe, as between an interstate commerce carrier and its employees, the rule of liability established by the act of June 11th, 1906. [34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891.] But we do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply only to cases of interstate commerce and to employees, who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred. We concur in the views expressed by Mr. Justice Moody as to the scope and interpretation of the act.

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We think the act is constitutional, and therefore, that the judgment should be reversed.

MR. JUSTICE HOLMES, dissenting.

I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrase "every common carrier engaged in trade or commerce" may be construed to mean "while engaged in trade or commerce" without violence to the habits of English speech, and to govern all that follows. The statute then will regulate all common carriers while so engaged in the District of Columbia or in any territory, thus covering the whole ground as to them; and it will regulate carriers elsewhere while engaged in commerce between the states, etc., thus limiting its scope where it is necessary to limit it. So construed, I think the act valid in its main features under the Constitution of the United States. In view of the circumstances I do not discuss details.

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(Supreme Court of Arkansas, April 29, 1907.)

[103 S. W. Rep. 158.]

Master and Servant—Duty to Warn Servant—Obvious Dangers.*—

A brakeman of mature years, physically strong and of more than average intelligence, jumped from a slowly moving train while in the course of his employment, and by alighting on a pile of gravel slipped under the cars, and was injured. The gravel was placed along the track for the improvement and repair of the roadbed, and decedent knew of its presence. Held, that the danger of alighting on the gravel was obvious, and defendant was not negligent in failing to warn the brakeman of such danger.

Hill, J., dissenting.

Appeal from Circuit Court, Hempstead County; Joel D. Conway, Judge.

Action by E. Miles, administrator, against the Louisiana & Arkansas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

*For the authorities in this series on the subject of the duty to warn and instruct employees, see foot-notes appended to *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361; *Richards v. Sloss-Sheffield Steel & Iron Co.* (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36; *Chicago, etc., Ry. Co. v. Riley* (C. C. A.), 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Western Ry. v. Russell* (Ala.), 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225.

As to the contributory negligence of employees in alighting from moving trains or cars, see note at end of case.

Louisiana & A. R. Co. v. Miles

W. H. Arnold, Henry Moore, and Henry Moore, Jr., for appellant.

McRae & Thompkins and W. E. Atkinson, for appellee.

McCULLOCH, J. This is an action brought against the appellant railway company by the administrator of the estate of M. L. Walsh, deceased, to recover damages on account of the death of Walsh, which is alleged to have been caused by negligence of the company. The plaintiff recovered a judgment for \$2,000 damages, and the defendant appealed.

There is no substantial dispute as to the facts. Walsh was a brakeman in the employ of the railway company, and had been employed in this capacity about 30 days when he received the injury which resulted in his death. He was about 25 years of age when the injury occurred, and had formerly been a telegraph operator, and was thus engaged 12 or 15 years. He is described as a man of more than average intelligence, well educated, healthy, and physically strong. He was running on a log train, the work of his train being on the south-bound trip from Stamps to supply logging camps with empty cars and to pick up and haul car loads of logs on the return trip. He was injured on the return trip about midday at Gallagher, a station or switch on the road. They were to pick up enough loaded cars at Gallagher to fill out the train and stopped there to get the cars. Walsh and the conductor were in the caboose when the engine whistled for Gallagher, and the conductor went to the back end of the caboose and Walsh to the front end to get off while the train was in motion. It was necessary, in order to save time, for them to get off before the train stopped, and walk across to the switch to meet the engine when it backed in on the side track after the loaded cars. The conductor swung off first from the rear end of the caboose and Walsh next from the front end, the speed of the train being three or four miles an hour. Walsh alighted on a pile or ridge of gravel running alongside the track, his feet slid under the caboose, and both legs were cut off. The roadbed at this point was about 3 feet high and gravel was deposited along the road 10 miles or more for ballasting and to raise the roadbed. The gravel was unloaded along the road from cars by means of a plow which was pulled through the train of cars, and fell along the edge of the embankment in piles or ridges 12 or 18 inches high. It would then be placed between and under the ties by men working with shovels. This did not interfere with the running of trains. The complaint charges negligence on the part of the defendant in placing the gravel along the track where brakemen had to alight, and in failing to instruct and advise Walsh of the hazard and danger to be encountered in alighting from a moving train where gravel had been distributed. The case was submitted to the jury upon the question of negligence in the last-mentioned particular.

The only question we are called upon to decide is whether the evidence establishes negligence on the part of the defendant; and, after careful consideration of this question, we are con-

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vinced that no negligence is shown. The injury resulted from one of the dangers incident to the work in which the employee was engaged. He assumed that risk when he took service, and no recovery can be had for the injury. This court said in *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49, 83 S. W. 346, that "it is not the duty of a master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties where experience and instruction are not necessary to enable him to do with safety the work he is employed or required to perform"—citing *Fones v. Phillips*, 39 Ark. 39, 43 Am. Rep. 264; *Railway Co. v. Torrey*, 58 Ark. 217, 24 S. W. 241. In the same case from which the above quotation is taken, which was a case of a minor suing for an injury inflicted by a negligence of the master, the court, speaking of the duty to warn the servant as to patent dangers, said: "If the danger of the employment is patent, and the servant, by reason of his youth and inexperience, does not know or appreciate the danger incident to the service he is employed to do, it would be the duty of the master to warn him of it and instruct him how to avoid it, so far as it can be, before exposing him to it." Herein lies the distinction between the duty of a master towards a servant of immature age and inexperience, and his duty towards a servant of full age and average intelligence. In case of the former it is the duty of the master to instruct as to patent as well as latent defects if, by reason of youth and inexperience, the servant does not know or appreciate the danger incident to his employment, and if the master knows or ought to know or take notice of his youth and inexperience. But, in the case of a servant of full age and normal intelligence, the master does not owe a duty to instruct or warn as to dangers which are open and obvious to the senses of any man of ordinary intelligence. A person of ordinary intelligence is presumed capable of observing patent dangers. This does not mean that, where a patent danger is created by the negligence of the master, the servant of mature years and ordinary intelligence is necessarily presumed under all circumstances to take notice of such danger so as to render him guilty of contributory negligence if he proceeds in the face of the danger. That may depend to some extent upon the circumstances; but, where the danger is one that has not been created by a negligent act of the master and is one which is an ordinary incident to the service, the servant is presumed capable of taking notice of it without warning or instruction from the master, unless on account of youth and inexperience there is reason to believe that he does not know of and appreciate the danger.

Mr. Labatt, in discussing the duty of the master towards servants not of immature years, says that "the master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinarily careful use of such knowledge, experience, and judgment as he possesses. The failure to give instruction, therefore, is not culpable where the

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servant might, by the exercise of ordinary care and attention, have known of the danger, or as the rule is also expressed, where he had all the means necessary for ascertaining the conditions, and there was no concealed danger which could not be discovered." 1 Labatt on Mast. & Servant, § 238. The same learned author makes the following statement of the law in a subsequent section: "It frequently happens that the evidence indicates either that the servant was not a person of the normal capacity contemplated by this principle, or that the risk to be encountered was of such a nature that even the possession of a normal capacity would not enable him to appreciate it without special training for, or a practical acquaintance with, the work to which it was incident. The presence of one or both of these elements will frequently render it impossible to say as a matter of law that the duty of instruction was not owed to the servant, when, if they were abstracted from the case, the plaintiff would not be allowed to retain a verdict in his favor rendered on the theory that such a duty existed. The qualifying effect of the elements, when considered with reference to the general principle adverted to above, is indicated by the statement that the duty of instruction does not extend to dangers open to the ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity as a servant." The Supreme Court of Massachusetts, in passing upon this identical question, said: "Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved." *Stuart v. West End Street Railway*, 163 Mass. 391, 40 N. E. 180. The following cases may also be read with profit on this subject: *Collins v. Laconia Car. Co.*, 68 N. H. 196, 38 Atl. 1047; *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214, 41 N. E. 265; *Hoyle v. Laundry Co.*, 95 Ga. 34, 21 S. E. 1001; *Gibson v. Railway Co.*, 23 Or. 493, 32 Pac. 295; *Findlay v. Russell Wheel & Foundry Co.*, 108 Mich. 286, 66 N. W. 50; *Ferguson v. Phoenix Cotton Mills*, 160 Tenn. 236, 61 S. W. 53; *Yeager v. Railway Co.*, 93 Iowa, 1, 61 N. W. 215; *E. T., V. & G. Ry. Co. v. Turvaville*, 97 Ala. 122, 12 South. 63; *Ill. Cent. Ry. Co. v. Price*, 72 Miss. 862, 18 South. 415.

Now, when we apply the facts of this case to the principles of law here announced, it is readily perceived that there is nothing upon which a charge of negligence against a appellant railway company can be justly predicated. Walsh was a full-grown man of mature years, strong in body, and of more than average intelligence. There was no negligence on the part of the

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company in placing the gravel on the embankment, as that was necessary and customary in the improvement and repair of its roadbed. Walsh necessarily knew that it was there, and the danger of alighting upon it from a moving train, if it was ordinarily dangerous, was obvious to any one. Any person of ordinary intelligence knows that it is more dangerous to alight upon an uneven surface or movable substance than upon a smooth and firm surface. He needed no previous warning or instruction on that score, and it cannot be said that the company owed him the duty of giving warning or instruction of a danger which was obvious to him.

Reversed and remanded.

NOTE.

CONTRIBUTORY NEGLIGENCE OF RAILROAD EMPLOYEES IN ALIGHTING FROM MOVING TRAINS OR CARS.

SCOPE OF NOTE.

The main question involved in our subject seems to have arisen in but very few cases. And the purpose of this note is to set these out so as to show the peculiar circumstances upon which the determination of the question hinged.

IN GENERAL.

Of course, the question whether a railroad employee who is injured when alighting from a moving car or train is guilty of contributory negligence in getting off while it is in motion is to be determined by the circumstances. It is necessary for a certain class of trainmen to alight from moving trains and cars in order to properly discharge their duties, and their conduct in so doing cannot be held to constitute contributory negligence per se.

Northern Pac. R. Co. *v.* Egeland, 163 U. S. 93; Central R. Co. *v.* DeBray, 71 Ga. 406; Brown *v.* Ohio & Miss. Ry. Co., 138 Ind. 648, 37 N. E. 717, 38 N. E. 176; New York, P. & N. R. Co. *v.* Coulbourn, 69 Md. 360, 16 Atl. 208; Ballard *v.* Chicago, R. I. & P. R. Co., 51 Mo. App. 453; Mitchell *v.* Chicago & A. Ry. Co., 108 Mo. App. 142, 83 S. W. 289; Whitcher *v.* Boston & M. R. Co., 70 N. H. 242, 20 Am. & Eng. R. Cas., N. S., 540, 46 Atl. 740; Patton *v.* Western N. Car., 96 N. Car. 455, 1 S. E. 863; Louisville & N. R. Co. *v.* Stacker, 86 Tenn. 343, 33 Am. & Eng. R. Cas. 365, 6 S. W. 737, 6 Am. St. Rep. 840; Colf *v.* Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. 408.

TEST APPLICABLE.

In determining the question of the contributory negligence of a railroad employee in alighting from a moving train or car, the test applicable is the conduct of a reasonably prudent and experienced man engaged in the same kind of work, under the same circumstances. New York, P. & N. R. Co. *v.* Coulbourn, 69 Md. 360, 16 Atl. 208; Ballard *v.* Chicago, etc., R. Co., 51 Mo. App. 453; St. Louis, etc., Ry. Co. *v.* Tuohey, 16 Am. & Eng. R. Cas., N. S., 453, 67 Ark. 209, 54 S. W. 577.

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ILLUSTRATIONS.

Stepping Off Slowly Moving Train.—It is not negligence per se in a railroad employee to step off a slowly moving train. So held in *Mitchell v. Chicago & A. Ry. Co.*, 108 Mo. App. 142, 83 S. W. 289.

Required to Alight at Station to Receive Orders—Platform Covered with Sleet.—Where a brakeman upon a freight train is required, in the discharge of his duty, to alight from the train while it is passing a station, to receive orders, the getting off the moving train is not, in itself, negligence, even though the platform upon which he alighted was covered with sleet. So held in *Brown v. Ohio & Miss. Ry. Co.*, 138 Ind. 648, 37 N. E. 717, 38 N. E. 176.

Same—Defective Platform.—Where a brakeman upon a freight train is required, in the discharge of his duty, to alight from the train while it is passing a station to receive orders, and does so without any negligence, but, by reason of an obstructing plank nailed upon the station platform by the employer, is caused to stumble and fall under the train to his injury, the employer is liable for his injuries. So held in *Brown v. Ohio & Miss. Ry. Co.*, 138 Ind. 648, 37 N. E. 717, 38 N. E. 176.

Attempting to Alight from Side of Car—Car on Other Track.—Where the duties of a brakeman require him to climb down the side of a moving box car for the purpose of alighting while it is in motion, his act in so doing cannot be held negligence per se, in an action to recover for injuries sustained by him while so doing, by reason of his coming in contact with a car on the other track. So held in *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 33 Am. & Eng. R. Cas., 365, 6 S. W. 737, 6 Am. St. Rep. 840.

Stones Near Track Yard—Switchman Injured.—Where the negligence of the railroad company in permitting stones or similar objects to remain scattered about its yard, or heaped near the track, results in injury to a switchman while he is engaged in switching, coupling, or uncoupling cars, the mere fact that he was alighting from a moving car or train when the accident occurred does not show that he was guilty of contributory negligence. So held in *Central R. Co. v. DeBray*, 71 Ga. 406.

Stepping Off Pilot without Necessity—Failure to Use Lantern—Low Embankment.—A brakeman on the pilot of an engine moving backwards and drawing cars, who, without any necessity therefor, steps off in the dark at a place with which he is unacquainted, without using his lantern, by the aid of which he might have seen a low embankment which rendered his conduct in so alighting dangerous, is guilty of such contributory negligence as will prevent recovery for his injuries thereby sustained. So held in *Burgin v. Louisville & N. R. Co.*, 97 Ala. 274, 12 So. 395.

Brakeman Swinging Out from Sills of Car without Looking Ahead—Pile of Rails.—In *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391, 26 N. E. 1070, it appeared that a brakeman, who had been employed for two years in shifting cars in a railroad freight yard, upon being ordered by the conductor under whom he was working to set two brakes upon a slowly moving freight train, jumped up between two

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platform cars and set the brake upon one car, and failing to set the other and intending to set one elsewhere on the train, he put a hand on the sill of each car and proceeded to swing out the way the cars were going, without looking ahead or taking any other precaution to avoid obstructions near the track; and that when he had swung clear of the cars, he for the first time saw a pile of rails beside the track, and knew he was going to hit it, as he let go his hold, but it was then too late to save himself, and he struck it, and was injured. It was held that he could not recover against the railroad company.

Stepping from Pilot to Track in Order to Turn Switch.—A brakeman who, for the purpose of turning a switch, deliberately goes down on the pilot, and steps on the track while the engine is moving at the rate of from four to eight miles an hour, is guilty of negligence, and cannot recover for an injury caused by his falling on the track and being run over by the engine, unless his peril was observed by the engineer in time to avoid the injury. So held in *Gibbons v. Chicago, B. & Q. Ry. Co.*, 66 Iowa 231, 23 N. W. 644.

Brakeman Stepping from Caboose without Ascertaining the Direction of Its Motion, in Attempting to Alight on Depot Platform.—In *Magee v. Chicago & N. W. Ry. Co.*, 82 Iowa 249, 48 N. W. 92, it appeared that a brakeman, who had been employed in the line of his duty in a caboose, while the same, attached to a switch engine, was standing at a railroad depot, in attempting to step from the caboose onto the depot platform, as the engine and caboose started to leave the same and were moving at the rate of two or three miles an hour, stepped toward the east, under the impression that the car was moving in that direction, and was thrown to the ground and was injured. The evidence showed that the same engine and caboose were usually moved westward to the depot to deposit passengers, and then moved to the east to sidetrack the caboose, but when the business required they were moved westward, and on this occasion were so moved to leave some stock cars at a chute and to take coal. No notice was given the brakeman of the intention to move west, but it was shown that, although the night was dark, the direction in which the car was moving was readily discernible; and that the brakeman hurriedly stepped from the car toward the east in the belief that it was moving east as usual, without looking to see which direction it was moving, and in doing so fell and was injured. It was held that, as he knew the car was moving at the rate of two or three miles an hour, and that it was dangerous to step therefrom in the opposite direction from that in which it was moving, and as he could, by looking, have known the direction in which it was moving, his failure to look before stepping from the car was negligence.

Alighting in Violation of Rule—Watchman Injured—Accident in Yard—Switch Stand.—Where a rule of the railroad company prohibited employees from jumping off engines or trains moving at a high rate of speed, and the plaintiff, a night watchman in the defendant's yard, was injured by striking a switch stand which stood seven and one-half inches from the gangway steps of the engine, just as he was in the act of swinging off the moving engine for the purpose

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of uncoupling a car, it was held that the question of his contributory negligence was for the jury. *Colf v. Chicago, etc., R. Co.*, 87 Wis. 273, 58 N. W. 408.

Employee on Pay Car to Receive Wages—Jumping When Speed Is Five Miles an Hour.—Jumping from a pay car moving at the rate of five miles an hour, by an employee of the railroad company, rightfully thereon for the purpose of receiving his wages, is not such negligence on his part as will, in itself, preclude his right to recover for an injury sustained thereby; but all the facts and circumstances of the case must be left to the jury; and it is for them to determine, whether the employee, in jumping from the car, acted as a reasonably cautious man would do under the circumstances. So held in *New York, P. & N. R. Co. v. Colbourn*, 69 Md. 360, 16 Atl. Rep. 208.

Speed of from Four to Seven Miles—Projecting Ties—Conductor Injured by Fall—Assumption of Risk.—Defendant railroad company suffered ties, from which it had removed a switch, to project beyond the regulation ties, so that one alighting from a train would step on them. Two years thereafter, plaintiff, a freight conductor, knowing of the switch, and that if it had been removed, in alighting from a train moving from four to seven miles an hour, while there was two inches of sleet on the ground, struck his foot over one of the projecting ties, which caused him to slip and fall. He testified that he did not know that the ties projected, though he had frequently stopped at or near them and it had been his custom to alight at a freight house close by to deposit his way bills, while the train proceeded a short distance to a passenger depot. It was held that the question as to whether plaintiff knew of the projecting ties, and was guilty of negligence, should have been submitted to the jury. *Whitcher v. Boston & M. R. Co.*, 70 N. H. 242, 20 Am. & Eng. R. Cas., N. S., 540, 46 Atl. 740.

Conductor Alighting to Register Time of Passage—Night—Encumbered—Right to Stop Train—Presumption.—Where the plaintiff, a conductor of a freight train, shows by his own testimony that he received the injury upon which the action is based by a car wheel running over his hand, by reason of a fall from a defective car stirrup, in attempting to get off his train while it was going at the rate of four or five miles an hour, in the middle of the night, with a lantern on his left arm, and his hand partially disabled, at a station where he was required to register the time of passage of his train; and that the rules of the company did not require him to alight while the train was in motion, but authorized him to cause the engineer to bring the train to a stand-still, such testimony raises a presumption of negligence on his part, and the burden is upon him to rebut such presumption. So held in *Pittsburgh & L. E. R. Co. v. Blair*, 11 Ohio Cir. Ct. Rep. 579.

Dangerous Speed—Attempting to Alight—Obstruction Near Track—Proximate Cause.—The fact that plaintiff, a member of a yardmaster's crew, was attempting to alight from a train moving at a dangerous rate of speed, at the time he was knocked off by an obstruction near the track, was not the proximate cause of the injury sustained

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by him; and charges ascribing contributory negligence in him for being in such position, regardless of his want of knowledge of the danger or reasonable apprehension thereof, are properly refused. So held in *Kansas City, etc., R. Co. v. Burton*, 97 Ala. 240, 12 So. Rep. 88.

OBEDIENCE TO COMMAND.

For the preceding authorities in this series on the subject of contributory negligence of employees in doing dangerous work in obedience to orders, see extensive note, 12 R. R. R. 377, 35 Am. & Eng. R. Cas., N. S., 377; *St. Louis, etc., R. Co. v. Mathis* (Ark.), 91 S. W. 763, 22 R. R. R. 538, 45 Am. & Eng. R. Cas., N. S., 538; foot-notes appended to *Wilson v. Southern Ry. (S. Car.)*, 53 S. E. 968, 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548; foot-notes appended to *Drake v. San Antonio & A. P. Ry. Co. (Tex.)*, 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157.

Jumping from Slowly Moving Train.—Whether a railroad employee, in jumping off a slowly moving train, in obedience to the command of his superior, is guilty of contributory negligence, is a question for the jury. So held in *Northern Pac. R. Co. v. Egeland*, 163 U. S. 93.

Order of Boss—Jump from Train—Test of Conduct.—In *Ballard v. Chicago, R. I. & P. R. Co.*, 51 Mo. App. 453, it is held that if an employee jumps from his master's moving train in obedience to the order of his boss, and in doing so is hurt, this will not bar his right to recover for his injuries against his employer, unless the danger of obeying such order was so glaring that a reasonably prudent man would not have undertaken it.

Laborer Ordered to Jump from Train—Certainty of Injury—Knowledge.—Where a railroad employee is ordered by his superior to jump from a moving train in order to perform a duty to the railroad company, if it does not appear to the employee that obedience to such order will certainly cause him to be injured, obedience to the command is not such contributory negligence as will prevent recovery for injuries to the servant thereby caused. So held in *Patton v. Western N. Car. R. Co.*, 96 N. Car. 455, 1 S. E. 863. In this case it is said in the opinion: "While to jump from a rapidly moving train of cars is very hazardous, and ordinarily to do so, is negligence, it is not contributory negligence where the plaintiff—a laborer on the railroad—is suddenly commanded by his employer or his agent to do so, in the course of his employment, and the command is at once obeyed from a sense of duty, and without time to think of and consider the hazard."

Order of Foreman—Inexperienced Laborer Alighting from Dirt Car.—For a railroad employee to step off a moving train tends to show negligence, whether it is so is a question for the jury, and where a laborer, engaged in shoveling dirt from a car, was ordered by the foreman to alight while it was in motion, where it appeared that he had only three or four days experience as a laborer on a railroad, he was not guilty of contributory negligence in alighting under the circumstances, but had a right to rely upon the order of the foreman and to presume that it was not dangerous. So held in *Mitchell v. Chicago & A. R. Co.*, 108 Mo. App. 142, 83 S. W. 289.

Note

Jumping from Car with Knowledge of Danger.—But a servant who, without objecting, jumps from a moving car in obedience to the directions of his master, when he knows it to be dangerous to do so, is not in the exercise of reasonable care for his own safety, and can not recover for injuries sustained by him in alighting in such manner. So held in *McArthur Brothers Co. v. Troutt*, 88 Ill. App. 638.

CUSTOMARY METHOD.

For the preceding authorities in this series on the question of the admissibility of evidence of custom and usage in negligence cases, see extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296; foot-notes appended to *Cederberg v. Minneapolis, etc., Ry. Co. (Minn.)*, 111 N. W. 953, 23 R. R. R. 98, 46 Am. & Eng. R. Cas., N. S., 98; foot-notes appended to *Bromley v. New York, etc., R. Co. (Mass.)*, 79 N. E. 775, 23 R. R. R. 11, 46 Am. & Eng. R. Cas., N. S., 11; *Shandrew v. Chicago, etc., Ry. Co. (C. C. A.)*, 22 R. R. R. 588, 45 Am. & Eng. R. Cas., N. S., 588, 142 Fed. Rep. 320; *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 92 S. W. 614, 22 R. R. R. 375, 45 Am. & Eng. R. Cas., N. S., 375; *Greer v. Union St. Ry. Co. (Mass.)*, 79 N. E. 267, 22 R. R. R. 240, 45 Am. & Eng. R. Cas., N. S., 240; *Yazoo, etc., R. Co. v. Byrd (Miss.)*, 42 So. 286, 22 R. R. R. 196, 45 Am. & Eng. R. Cas., N. S., 196.

Stepping from Pilot in Advance of Engine to Throw Switch—Usual Method.—In *Grant v. Pittsburg & W. Ry. Co.*, 10 Ohio Cir. Ct. Rep. 362, it appeared that plaintiff, a brakeman, in order to go ahead of his train to throw a switch and turn the train onto a side track, stepped from the front of the pilot of the advancing engine, and was run over by the engine and injured. It was held that he could not call witnesses to prove that brakemen usually performed the same work in the manner plaintiff attempted to perform it.

Watchman "Swinging Off" Engine—Proximity of Switch Stand—Attention Withdrawn by Duties—Practice in Yard.—In *Colf v. Chicago, St. P., M. & O. R. Co.*, 87 Wis. 273, 58 N. W. 408, it appeared that plaintiff, in the performance of his duties, at night, was riding on a road engine which was used for switching in the switch yard in question, and was about to "swing off" from the gangway step when his foot caught on the arm of the switch stand and he was injured. He had worked in the yard a considerable time, but always at night. He had never thrown this switch, because it was never used, and he had never noticed that the stand was nearer the track than others in the yard. It bore no light, and plaintiff's attention was momentarily drawn from his own safety by the necessity of giving instructions to a new hand. It was held that it was a question for the jury whether plaintiff was negligent in attempting to jump from the engine as he did; and that evidence that it was the practice of men in the yard to jump from the engine while it was moving, was not admissible upon the question of plaintiff's negligence in so doing so. In this case it is said in the opinion: "To determine whether the other employees who jumped from engines were negligent in doing so would necessitate an inquiry into the facts of each case, and thus open up an in-

Note

terminable field of contention. There was no offer to show that such a practice was known to any officer or employee of the defendant whose duty it was to regulate the location of switches or other structures. The necessary effect of such testimony would be to cause the jury to believe that, if others jumped from the engines, it was not negligence for the plaintiff to do so. There is no such rule. *Lewis v. Smith*, 107 Mass. 334."

Brakeman Jumping from Train without Looking—Ordinary Custom—Approval of Superintendent.—In *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391, 26 N. E. 1070, an action against the railroad to recover for personal injuries sustained by a brakeman while jumping from a moving freight train, an offer to prove that in so doing, without looking or being able to see where he would alight or what obstructions he would meet, he was only doing what was ordinarily done by the railroad employees engaged in like employment and under similar circumstances, with the knowledge and approval of defendant's superintendent, was properly refused.

Switch Thrown Wrong—Jumping in Front of His Engine—Hole in Track.—In *Andrews v. Birmingham Mineral R. Co.*, 99 Ala. 438, 12 So. 432, it appeared that a brakeman, as his train approached a switch, was standing on foot braces on the pilot of the locomotive; that when about forty feet from the switch he, according to his testimony, saw it was thrown wrong for the train, and was ready to jump, when the engineer called, "Andrew, look out for that switch." He then jumped on the track in front of the engine and took three steps towards the switch, when his leg went into a hole in the road-bed and he fell. The engine was moving at the rate of from three to five miles per hour and slowing up when he jumped off. By reason of the fall, he was overtaken by the engine, run over and injured. The rule that custom and practice can not justify the doing of an act which is negligent per se was held applicable, and the brakeman's conduct was held to have been negligence per se.

TO AVOID THREATENED DANGER.

For the preceding authorities in this series on this subject, see foot-notes appended to *Alabama City, etc., Ry. Co. v. Bates* (Ala.), 43 So. 98, 23 R. R. R. 564, 46 Am. & Eng. R. Cas., N. S., 564,

Collision Threatened—Jumping from Engine.—A fireman was not guilty of contributory negligence in jumping from an engine as it was about to collide with a train. *Cowen v. Ray* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 531, 108 Fed. Rep. 320.

Same—Negligence of Railroad—Jump from Hand-Car.—In *Houston & Tex. Cent. Ry. Co. v. Rodican*, 15 Tex. Civ. App. 556, 40 S. W. 535, it is held that where the evidence showed that plaintiff, a section hand, on the sudden approach of a train, and under a sense of impending danger, leaped from his hand-car in the only direction open to him; and that the condition which caused him to act so was due solely to the negligence of his employer, the defendant railroad company, a verdict awarding damages to him for injuries sustained in so alighting from the car will not be set aside as unsupported by the evidence.

Note

Same—Engineer Injured—Failure of Engines to Collide.—In *Gross v. Pennsylvania, P. & B. R. Co.*, 62 Hun 619, 16 N. Y. Supp. 615, it appeared that plaintiff was an engineer running an engine on a single track road, and on a foggy morning saw another engine approaching. He reversed his engine and jumped from it and thereby received injuries. The engines stopped before colliding within a few feet of each other. It was held that whether he was justified in jumping was a question for the jury; and that he could not be charged with imprudence simply because the engines stopped before striking.

Same—Negligence of Railroad—Jump from Hand-Car—Questions for Jury.—Where a railroad employee while running a hand-car is put in sudden apprehension of a dangerous collision with an approaching locomotive, and the threatened collision is due alone to the negligence of the railroad, whether it is rash or reckless to leap from the car, or whether he should have remained upon it, or left it by means less hazardous than jumping, are questions for jury. So held in *Smith v. Wrightsville & T. R. Co.*, 41 Am. & Eng. R. Cas. 320, 83 Ga. 671, 10 S. E. 361.

Same—Baggage Master Jumping from Train—Defense—Order of Conductor.—In *Georgia R. & B. Co. v. Rhodes*, 56 Ga. 645, it appeared that a baggage master upon a train, when there was imminent danger of a collision, jumped from it and was injured. It was held that it was no defense to an action for his injuries that the conductor ordered him not to jump.

Jumping from Engine—Questions for Jury.—In *Banking Co. v. Roach*, 64 Ga. 635, it is held that, an engineer having jumped from his engine and been killed, and the question being whether or not he was without fault, the necessity of jumping, his ability to jump and the safety with which he could do so were all for the consideration of the jury.

Test of Conduct—Possibility of Remaining with Safety.—The mere fact that the death of a railroad employee resulted from his jumping from a moving car will not prevent a recovery for his death, if, at the time he jumped, the circumstances were such as to justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car to escape an impending danger, even though it appears that deceased might have escaped unhurt had he remained on the car. So held in *St. Louis, etc., Ry. Co. v. Tuohey* (Ark.), 16 Am. & Eng. R. Cas., N. S., 453, 67 Ark. 209, 54 S. W. 577.

Jump from Engine Approaching Burning Trestle.—Where a brakeman riding on an engine saw that it could not be stopped before it reached the burning portion of a low trestle and jumped when the engine was about two car lengths from the fire, he was not guilty of contributory negligence in jumping from the engine while it was moving. So held in *Root v. Kansas City Southern Ry. Co.* (Mo.), 20 R. R. R. 171, 43 Am. & Eng. R. Cas., N. S., 171, 92 S. W. 621.

Actual Necessity—Burden of Proof.—Where an employee was injured in jumping from a moving car to avoid imminent peril, he need not show, in order to recover, that it was actually necessary for him

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to jump in order to save himself. So held in *Pierson Lumber Co. v. Hart* (Ala.), 18 R. R. R. 791, 41 Am. & Eng. R. Cas., N. S., 791, 39 So. 566.

Danger from Defect—Assumption of Risk—Pleading.—In an action for injuries to an employee, received in jumping from a moving car to avoid imminent peril, a plea not alleging that the danger from the supposed defect was either obvious or known to plaintiff was insufficient. So held in *Pierson Lumber Co. v. Hart* (Ala.), 18 R. R. R. 791, 41 Am. & Eng. R. Cas., N. S., 791, 39 So. 566.

Position of Peril—Question for Jury.—In an action for injuries received by an employee in jumping from a moving car to avoid imminent peril, that the train was running only 10 miles an hour will not authorize the court to say that plaintiff was not in a position of peril. So held in *Pierson Lumber Co. v. Hart* (Ala.), 18 R. R. R. 791, 41 Am. & Eng. R. Cas., N. S., 791, 39 So. 566.

A. R. Y.

ATCHISON, T. & S. F. Ry. Co. v. McELROY.

(Supreme Court of Kansas, July 5, 1907. Rehearing Denied Oct. 5, 1907.)

[91 Pac. Rep. 785.]

Railroads—Licensees on Track—Negligence.*—When a railroad company stops a passenger train where other tracks are between it and the depot platform, the rights of people having business with such train, and the duty of the company toward them, are the same as if all the intervening space between the depot and the train constituted the platform.

Same—Looking and Listening.*—Under such circumstances, passengers and other persons rightfully there have a right to assume that they will be protected from danger by the company, and are under no obligations to anticipate and guard against the approach of other

*For the authorities in this series on the subject of the liabilities of a railroad company with respect to its passengers struck by trains while crossing tracks between depot and their trains, see *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 19 R. R. R. 736, 42 Am. & Eng. R. Cas., N. S., 736 (evidence did not show that at time passenger was struck by train he was being escorted across tracks to his train by agent of defendant); *Oliver v. Columbus, N. & L. Ry. Co.* (S. Car.), 6 R. R. R. 708, 29 Am. & Eng. R. Cas., N. S., 708 (liability for injury to passenger, caused by negligence, on track of connecting line, over which defendant company was accustomed to run its cars for a short distance and turn them over to connecting line); *Walger v. Jersey City, H. P. St. Ry. Co.* (N. J.), 14 R. R. R. 226, 37 Am. & Eng. R. Cas., N. S., 226 (negligence was question for jury when passenger was run into by car while transferring from one car to another); *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531 (negligence was question for jury where passenger was struck by train while crossing intervening tracks to get from his station to his train); *Chicago Terminal Transfer R. Co. v. Schmelling* (Ill.), 5 R. R. R. 298, 28 Am. & Eng. R. Cas., N. S., 298 (proximate cause

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trains. The ordinary rule of "look and listen" does not apply to such a situation.

where passenger was injured on track of another company after alighting); *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531 (right of engineer to assume that passenger crossing intervening tracks to get from station to his train would avoid danger; and whether engineer exercised proper care after seeing passenger crossing such tracks); *Chicago, B. & Q. R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350 (where person traveling on shipper's pass to look after cattle was struck by engine on other track while waiting to make change of cars, negligence of carrier was question for jury; and the evidence was sufficient to warrant finding that carrier was guilty of actionable negligence which was proximate cause of injury); *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531 (degree of care and duties which were due passenger struck by freight train while crossing intervening tracks to get from station to his train); *Chicago, etc., Ry. Co. v. Ryan* (Ill.), 8 Am. & Eng. R. Cas., N. S., 754 (train passing between station and passenger's train at high rate of speed); *Chesapeake & O. Ry. Co. v. King* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 167; *Chicago & A. R. Co. v. Kelly* (Ill.), 17 Am. & Eng. R. Cas., N. S., 52 (running freight train past station at a high rate of speed while passengers are alighting from another train is negligence); extensive note, 2 R. R. R. 136, 25 Am. & Eng. R. Cas., N. S., 136.

For the authorities in this series on the subject of the contributory negligence of passengers, while crossing tracks between depot and their trains, see *Pendleton v. Richmond, F. & P. R. Co.* (Va.), 19 R. R. R. 73, 42 Am. & Eng. R. Cas., N. S., 73 (sufficiency of evidence of contributory negligence); *Steber v. Chicago & N. W. Ry. Co.* (Wis.), 6 R. R. R. 656, 29 Am. & Eng. R. Cas., N. S., 656 (Failure to see train in plain view); *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531 (failure to stop, look, and listen); *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531 (effect of passenger's intoxication); *Chicago, B. & Q. R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350 (contributory negligence was question for jury); *Dieckman v. Chicago & N. W. Ry. Co.* (Iowa), 19 R. R. R. 736, 42 Am. & Eng. R. Cas., N. S., 736 (was guilty of contributory negligence); *Gilliland v. Middlesex & S. Traction Co.* (N. J.), 4 R. R. R. 406, 27 Am. & Eng. R. Cas., N. S., 406 (prospective passenger crossing in front of street railway car; *Spavin v. Lake Shore & M. S. Ry. Co.* (Mich.), 3 R. R. R. 135, 26 Am. & Eng. R. Cas., N. S., 135 (walking on track to board car); *Chicago, St. P., M. & O. Ry. Co. v. Lagerkrans* (Neb.), 4 R. R. R. 861, 27 Am. & Eng. R. Cas., N. S., 861 (walking to station on track; *Chesapeake & O. Ry. Co. v. King* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 167 (care required of passenger crossing intervening tracks to platform); *Graven v. MacLeod* (C. C. A.), 14 Am. & Eng. R. Cas., N. S., 305 (care required of passenger); *Beecher v. Long Island R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 295, 17 Am. & Eng. R. Cas., N. S., 199 (failure to look and listen; and question for jury); *Chicago & E. I. R. Co. v. Chancellor* (Ill.), 10 Am. & Eng. R. Cas., N. S., 842; *Betts v. Lehigh Val. R. Co.* (Pa.), 14 Am. & Eng. R. Cas., N. S., 299 (failure to stop, look, and listen not contributory negligence as matter of law).

For the authorities in this series on the subject on the right of a passenger to rely on the assumption that the carrier has performed, or will perform, its duties to him, see foot-notes appended to *Farrell v. Great Northern Ry. Co.* (Minn.), 23 R. R. R. 48, 46 Am. & Eng. R. Cas., N. S., 408.

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Same—Evidence.†—A boy about 11 years of age was sent by his father to deliver a package to a passenger on a train which was expected to stop at the station. Held, that the boy, while engaged in making such delivery and returning to the station platform, was rightfully on the premises of the railroad company, and entitled to be protected at least by the exercise of ordinary care.

Same.*—When a railroad company causes a passenger train to stop on a side track, leaving other tracks between it and the depot platform, it is negligence to permit another train to pass between such passenger train and the depot at a high rate of speed, and without giving warning thereof by ringing the bell, sounding the whistle, or otherwise, while business is being rightfully transacted with the standing train, and the company will be liable to any person rightfully there who is injured thereby.

(Syllabus by the Court.)

Error from District Court, Clay County; O. L. Moore, Judge.

Action by Clarence McElroy against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, for plaintiff in error.

Coleman & Williams, for defendant in error.

GRAVES, J. Clarence McElroy, a boy about 11 years of age, was struck by a passing engine on the railroad of the plaintiff in error at the station of Aurora, in Cloud county, and was injured so that his left foot had to be amputated immediately in front of his ankle. He commenced this action in the district court of Clay county May 3, 1905, and recovered a judgment of \$3,000. The railway company, being dissatisfied, brings the case here for review.

At the station of Aurora, the north-bound passenger train and the one going south pass each other. The north-bound train, as a rule, arrives first, and stops on a side track, leaving the main track between it and the depot platform. Passengers leaving the train and those getting on are compelled to cross over the main track. If the train going south arrives before the north-bound train leaves, which it does ordinarily, no stop is made until reaching the depot platform. The plaintiff on the occasion in question was sent by his father, who was engaged in business at that place, to deliver a small package of merchandise to a passenger on the north-bound train. The boy delivered the package to the passenger while the train was standing on the

†For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to persons, other than passengers, at stations and depots on business, see foot-notes appended to *Illinois Cent. R. Co. v. Willis* (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312; *Croft v. Chicago, etc., Ry. Co.* (Iowa), 21 R. R. R. 583, 44 Am. & Eng. R. Cas., N. S., 583.

*See note on p. 487.

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side track, and, before he got across the main track on his return, he was struck by the engine of the train going south as it was approaching the platform. No warning by whistle, bell, or otherwise was given to indicate the coming of the train from the north. The plaintiff did not look or listen for the incoming train, or take any care to avoid danger therefrom. Much has been said in argument concerning the degree of care due from the company to the plaintiff, and upon the question of plaintiff's contributory negligence. Many special questions of fact were submitted to and answered by the jury for the purpose of developing these propositions. In our views of the case, however, it will be unnecessary to consider all of the questions presented. Where a railroad company finds it necessary or convenient in the transaction of its business to have a passenger train stop on a side track, leaving one or more tracks between such train and the depot platform, that method may be adopted, but if it is, then, as between the company and other people, the entire space between the depot and the trains must be regarded the same as if it all together constituted the platform.

One of the special questions presented to the jury in this case, and its answer thereto, reads: "Q. 29. If you find that the defendant, the Atchison, Topeka & Santa Fe Railway Company, was negligent, then state fully, first, in what respect it was negligent; and, second, what agent or employee was guilty of such negligence. A. Because it allowed the main track next to the station to be used as a platform to transfer passengers, baggage, mail, and express from the north-bound passenger train, known as No. 307, to and from the station, that said company had no proper signals, alarms, and safeguards at Aurora; second, that the train crew of the south-bound train No. 306 failed to either ring the bell or blow the whistle on approaching the station." Under this finding of fact, it will be unnecessary to consider the strict legal relation existing between the plaintiff and the company, or to define the exact degree of diligence due from the company to the plaintiff. It is conceded that the plaintiff was rightfully where he received the injury, and that the company owed him at least reasonable and ordinary care. Under this conceded rule, we think the case may be decided. What constitutes ordinary care must always be determined from the circumstances of the situation being considered. In 1 Thomp. on Neg. § 25, it is said. "The care, caution, and diligence required by the law is always measured by the circumstances of the particular case, and the rule of admeasurement is 'the greater the hazard, the greater the care required.'" The situation presented in this case shows that the plaintiff in error, when it ran the train going south into the station, was chargeable with notice that its patrons and other people were scattered over the space between the depot and the other train, engaged, as people are on such occasions, removing baggage, hurrying on and off the train, giving and receiving parting and welcoming salutations, and were generally in a state of confusion, which would make them less liable to notice

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the approach of danger and less prepared to avoid it than under circumstances. It knew that the people so situated had a right to feel secure and safe from any danger on account of the negligent operation of trains in their midst, and would feel entirely free from any necessity for the exercise of care or caution. These and other conditions always present upon such occasions constitute the situation, by which must be measured the degree of care with which a person of ordinary caution and prudence would run a passenger train among people thus engaged. The conduct of the company in running its train at a high rate of speed, without warning of any kind, was culpable negligence. The plaintiff and other persons there were under no duty or obligation to anticipate and guard against negligence on the part of the railroad company. They had the right to feel secure from injury on account of passing trains. They might rest upon this feeling of security until warned or notified of danger. The ordinary rule of "look and listen" has no application to such a situation. When a railroad operates a train under such circumstances, it assumes the peril. These conclusions result from the application of the most obvious and familiar rules of human conduct. 2 Shearman & Redfield on Neg. § 525; 1 Thomp. on Neg. §§ 25-31, 968 et seq.; 3 Thomp. on Neg. § 2705; *Tubbs v. Michigan Central Railroad Co.*, 107 Mich. 108, 64 N. W. 1061, 61 Am. St. Rep. 320; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. N. Y. Cent. & H. R. R. Co.*, 84 N. Y. 241; *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954.

The judgment is affirmed. All the Justices concurring.

LEVI v. WORCESTER CONSOL. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 17, 1906.)

[78 N. E. Rep. 853.]

Injunction—Objections to Relief—Inconvenience and Injury to Defendant.—Injunction will not lie to require a railway company to restore a way which it has excavated to its previous condition, where it will subject the company to great inconvenience and plaintiff has unreasonably delayed the enforcement of his rights.

Same—Assessment of Damages—Retention of Bill.—In such case the bill may be retained to assess the damages, which plaintiff has sustained.

Report from Superior Court, Worcester County; Frederick Lawton, Judge.

Bill by Sarah Levi against the Worcester Consolidated Street Railway Company for an injunction requiring defendant to fill an excavation and restore a certain way to the condition in which it was before its operations were begun. Case reported. Decree to stand on conditions.

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Sheehan & Cutting, for plaintiff.

Chas. C. Milton, Chandler Bullock, and *F. H. Dewey*, for defendant.

HAMMOND, J. "It is not every case of a permanent obstruction in the use of an easement that entitles the aggrieved party to a restoration of the former situation. Each case depends on its own circumstances. It is for the court in the exercise of a sound discretion to determine in each case whether a mandatory injunction shall issue. It will not be issued when it appears that it will operate inequitably or oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor when the injury complained of is not serious or substantial and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss." Morton, J., in *Starkis v. Richmond*, 155 Mass. 188, 195, 196, 29 N. E. 770, citing 2 Story, Eq. Jur. 959a; Kerr on Injunctions (1st Am. Ed.) 231; *Royal Bank of Liverpool v. Grand Junction Railroad*, 125 Mass. 490; *Lewis v. Chapman*, 3 Beav. 133; *Gookin v. Balls*, 13 Ch. D. 324; *Aynsley v. Glover*, L. R. 18 Eq. 544.

No discussion is required to show that upon the facts found by the master this case is one which calls for the application of this principle. It is manifest that to restore things to the former situation would subject the defendants to great inconvenience and loss and is inequitable, and that the decree ordered by the trial court sufficiently provides for the wants of the plaintiff as to the right of way. She should however have recompense for the damages in the past, and the bill may be retained to assess such damages. *Jackson v. Stevens*, 156 Mass. 496, 32 Am. St. Rep. 476. As thus amended the order for the decree is to stand, unless the plaintiff within 30 days from the filing of the rescript in this case shall file a rejection of the new right of way proposed as a substitute, and shall ask full damages for the permanent loss of the right of way without such substitution, in which case the bill may be retained to assess such damages or may be dismissed without prejudice to her right to an action at law for damages, as she may elect.

So ordered.

LOUISVILLE & N. R. Co. v. DANIEL.

(Court of Appeals of Kentucky, March 6, 1906.)

[91 S. W. Rep. 691.]

Railroads—Use of Tracks by Trespassers—Care Required of Railroad.*—Where trespassers habitually use a railroad track with the knowledge or acquiescence of the railroad, their presence there must be provided against by the railroad for a fact within its knowledge.

Evidence—Train Dispatcher's Record.—On an issue as to whether a train was at or near a certain part of a railroad's system at a certain time, the record of the train dispatcher as to the movements of trains, made up from his own orders and from telegraphic reports transmitted to him from stations along the line, was admissible in evidence.

Damages—Personal Injuries—Evidence—Habits.†—In an action for personal injuries, plaintiff may introduce evidence tending to show habits of industry and sobriety.

Same—Moral Character.—In an action for injuries, evidence as to plaintiff's moral character is not admissible, except as impeaching evidence or in rebuttal to such.

Railroads—Injuries to Persons on Track—Evidence—Sufficiency.—In an action for injuries, held, that a verdict in favor of plaintiff was ground for a new trial as palpably against the weight of the evidence.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

Action by Louis Daniel against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield and Clifton J. Waddill, for appellant.
Gordon, Gordon & Cox, for appellee.

O'REAR, J. Appellee alleges that while walking across appellant's railroad tracks in its yard at Madisonville, at a point be-

*For the authorities in this series on the subject of the care due from trainmen to licensees and trespassers on railroad tracks, see foot-notes appended to *Barmore v. Vicksburg, etc., Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841; foot-notes appended to *Engelking v. Kansas City, etc., R. Co.* (Mo.), 17 R. R. R. 800, 40 Am. & Eng. R. Cas., N. S., 800; *Gilliam v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; *Ray v. Chesapeake & O. Ry. Co.* (W. Va.), 17 R. R. R. 779, 40 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Seaboard & R. R. Co. v. Vaughan* (Va.), 17 R. R. R. 600, 40 Am. & Eng. R. Cas., N. S., 600; *Hamlin v. Columbia & P. S. R. Co.* (Wash.), 17 R. R. R. 1, 40 Am. & Eng. R. Cas., N. S., 1; *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; foot-notes appended to *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; foot-notes appended to *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, Am. & Eng. R. Cas., N. S., 413.

†See note, 18 R. R. R. 319, 41 Am. & Eng. R. Cas., N. S., 319.

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tween Broadway and Sugg streets, where the public had been permitted by the railroad company to so use its tracks as a pass-way for more than 20 years, he was injured by being run against by a car detached from the engine. The accident occurred in the nighttime. Appellee claims, or rather his testimony conduces to show, that appellant was making a running switch in the nighttime, and turned the car loose without light or other signal, so that he was unaware of its approach till it ran upon him. The decided weight of the evidence is against his theory of the cause of the injury. But upon his testimony (and he was the only witness on either side who claims to have known of the injury at the time it occurred) there was a case to be submitted to the jury, provided appellant was required to take notice of appellee's presence at the place and time of his injury, so as to avoid injuring him. A number of witnesses testified for appellee that the point where the injury occurred was well within the city of Madisonville, a town of some 4,000 or 5,000 population; that the railroad tracks and right of way at this point were habitually used by the public in passing. If people do trespass on the railroad track or right of way, and if their presence is known, the railroad company cannot ignore the fact and wantonly inflict injury upon them. If people are so in the habit of so using the right of way in such unauthorized manner, but with the knowledge or acquiescence of the railroad company, the fact of such use is impliedly an invitation to its continuance, in a sense, and imposes on the railroad company the duty to look out for such trespassers the same as if they were known in fact to be there. The fact that they habitually so use the track, and are invited and permitted to so use it, suggests reasonably that they are so using it, and their presence must therefore be provided against as a fact in the knowledge of the railroad company. This case, in the proof, however, falls short of the requirements of the principle discussed, as it was not shown that such use was with the knowledge or consent of the railroad company. While the use might have been so extensive and continued as to have raised the presumption of such knowledge, or rather to have established it, the proof did not go that far. It was error, therefore, to have submitted to the jury the question of appellant's negligence, based upon its failure to exercise the care due under the state of circumstances discussed.

A further statement of the facts is necessary to an application of certain evidence offered, and admitted or rejected by the trial court. It is conceded that appellee was stealing a ride on one of appellant's freight trains passing through Madisonville. He had got on the train at a point in Indiana, and was beating his way south. He claims that before the train reached Madisonville he was discovered by a brakeman on the train, who inquired where he was going, and, on being informed and further told that appellee had no money, assented to his riding on the train. On the other hand, the conductor and all the brakemen testified that when appellee was discovered he was put off; that they did not

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consent to his riding on the train, but that he was again discovered on it, and put off again; that he again boarded the train without their knowledge, and they did not know he had done so till they had learned of his injury. Appellee does not claim that he was injured while on this train, or was injured by it. His claim is that it stopped at Madisonville, and then he got off and started to cross another track; that he saw an engine coming down the track, and after it passed he undertook to cross the track behind it, when he was hallooed at by some one in the dark. Looking up, he saw a freight car rapidly approaching him on the same track, following the engine, but without a light; that he had not seen or heard it before, and, not knowing of it, it ran against him before he could get out of the way. Appellant contends that his story is a fabrication or an hallucination. It asserts that there was no other engine or train at Madisonville at that time, nor for some hours before or after, and that the train that he came in on did not stop there at all, but simply slowed up, and when it got the cleartrack signal from the operator at the station it increased its speed and passed on south through the town. Appellant's theory is that appellee sustained his injury in attempting to alight from the moving train, and was not struck by any other train at all. It was, therefore, very material to show whether there was any other train at that point at or near that time. The depot agent and the operator and assistant testify that there was not. The engineer, conductor, and brakeman also testify to the same fact. They all testify, also, that that freight train did not stop at Madisonville on that occasion.

Appellant offered to prove by its train dispatcher that he kept an accurate record of the movements of all trains on that division of appellant's road; that it was his duty to do so; that this record was made up at the time from his own orders, upon which all trains on that division moved, and from telegraphic reports transmitted to him from the stations along the line as each train arrived and departed, from which he at the time made an entry on his record; that the record was made accurately at the time, and was true. He produced his record, called a "train sheet," or telegraphic register of trains. This sheet purported to show the time of the arrival and departure of every train passing over that road on that day, at Madisonville, as well as all other telegraphic stations on that division. Appellant offered to introduce it as evidence on its behalf on this trial, but upon objection of appellee it was rejected. The witness was permitted to state what he knew personally about it, based upon his personal knowledge and recollection. But he was compelled to state and did state that he had little or no personal knowledge on the point, as he was stationed at Earlington, the end of the division, and not at Madisonville, on that date, and could not recollect, from the nature of the business, many days afterwards, where so many trains were at a given day and moment; that he had to rely and did rely exclusively upon his record, made at the time as stated. The question for decision is, was the record admissi-

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ble as evidence on appellant's behalf? We think it was, and will give our reasons for the ruling.

Books of original entry, called shopkeepers' or parties' books, have for centuries been admitted as evidence in favor of the party keeping them. Numerous limitations upon the rule are noted. The rule itself has been subjected to not a few changes in judicial application, and to many more by legislative action. While very narrow originally, the tendency has been upon the whole to broaden its application, though it is believed that the first principles upon which it was founded are to be clearly recognized in every change that it has undergone. These are, in fine, that, as the courts require the production of the best evidence the nature of the case admits of, necessity and circumstantial guaranty of trustworthiness of such entries may render them, not only the best, but the only reliable, evidence practicable to be obtained to establish the disputed fact. It is scarcely within the scope of the questions here involved, even if it were necessary at this day, to trace the origin of the rule or to follow its course and deviations. Of this rule of the common law, as interpreted by English and American courts, it can be truly said, as of many others, proving the wisdom and elasticity of the systems, that it adapts itself logically to conditions undreamed of in its origin. Commerce has grown enormously in magnitude and variety since then. What was possible, and not unreasonably practicable, a century ago, would be intolerable in the conducting of business in this age. But the necessity of rules of evidence are the same, and the reasons for them, in the main, are not different. If a fact is in dispute, to be determined in or out of court, the safe course is a resort to the best evidence of which the nature of the case will admit, and such as has been found most reliable in the practical adjustment of such matters among those whose constant business it is to adjust them. Mercantile and industrial life, producing, as they do, nearly all the transactions of men that come before the courts of law and equity, are essentially practical. That which is the final basis of action, of calculation, reliance, investment, and general confidence in every business enterprise, may safely, in general, be resorted to to prove the main fact. The courts need not discredit what the common experience of mankind relies upon. Such is the use of books or records of original entries made under circumstances that are a guaranty of their trustworthiness. In the conduct of a modern railroad system, it is indispensable that in the movement of trains an exact knowledge should be had, at a central point of observation and direction, of the location of each train in operation over a given line or between given terminals, and that this knowledge should accompany each movement of each train until it had arrived at its destination. They pass over the same tracks. Whether going in the same or opposite directions, they would be liable to, if not certain of, collisions, entailing destruction of life and property, unless they could be directed by a common authority, and so timed and controlled in their movements as to in-

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sure their safe passage. From the nature of such things and in spite of all care and foresight, accidents happen to them, or some of them, so as to disarrange their schedules, to throw them out of all chance to accomplish what otherwise they would do. Those in charge of each must be, under existing conditions, in a large measure ignorant of the movement, and more particularly of the conditions, of the others. The train dispatcher, who directs them and who keeps tab on the movement of each, and maintains as it were a birdseye view of the whole system under his control, is the practical solution of this difficulty as it now exists. It would be folly for him to endeavor to trust to his memory, even for the hour, as to the whereabouts or condition of each train. He must have a record before him upon which he can rely, to which he can resort at any moment to acquaint his mind with those important facts as verities. As the district within his charge usually covers a considerable distance, say 100 miles or more, he can know only what is reported to him from the numerous intermediate points of observation by those in charge. This is done by the use of the telegraph. Thus as promptly as by word of mouth by clerks in his presence he gets the information. He immediately records it on the record, which he is required to and does keep for that purpose. The very nature of the matter, its grave importance to so many lives, not to mention fortunes, dependent upon his record's being accurately kept, are the strongest possible guaranties to the general accuracy of the entries. No motive, not criminal in the highest degree, could exist for fabrication in making such original entries. He has no personal interest whatever to serve by making a knowingly false entry. On the contrary, the security of his position, the prospect of advancement, the fear of the awful consequences of mistake, the impossibility of keeping a false record as a working record in the matter without immediate disaster and detection, all combine to insure against any motive on his part for fabrication.

To the objection that his record is not his own personal knowledge, the answer is that the intelligence transmitted to him by his subordinates is all of the same kind and grade as that recorded in his entries. Its trustworthiness is supported by the same considerations. It is at least as reliable as salesmen's, draymen's, porters', or wharfingers' information conveyed to a bookkeeper, who makes the original entries thereof, all of which is now nearly everywhere allowed to be proven by the introduction of the book entries so made, as evidence of the facts shown by the entries. Wigmore on Evidence, § 1530. The entrant discharges a duty which has assumed only in the keeping of an accurate record of his entries. He makes them contemporaneously with the act which they represent. They are made in the regular course of transactions, which, to be utilized in the business, must from greatest necessity be precise and true. They are made in the habit and system of keeping such a record with regularity. Every consideration by which it is possible to establish the existence of a past event, by testing the accuracy of the evidence of it, is sat-

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ified by such a record. It is less apt to be mistaken than the person who made it would be if testifying to it from memory subsequently. That it is made up of details furnished by different persons widely apart, and all acting under a high incentive for accuracy, and who report that which is transpiring at the moment under their eyes, is better evidence, because more apt to be a true picture of the real situation, than if it were possible for one person to have the whole as a panorama before his own eyes, and then attempt to set it down in the record, much less to have to depend on his memory afterward to truthfully recall and relate it. If every telegraph operator along the line were to come to court, and all testify to their recollections of the position of trains at or near their stations at a given hour and day, the result would be neither more certain, nor the truth clearer, than by the use of the original record made at the time the events were happening. In addition, to call all these men away from their posts to the court, to bring a regiment of witnesses to prove minute details of a status more easily and truly shown by a contemporaneous record, would be to discard the better for the worse, and to trammel the administration of justice.

In *Louisville Bridge Co. v. L. & N. R. R. Co.*, 116 Ky. 258, 75 S. W. 285, the railroad company's books, showing the aggregate of waybills constituting the volume of traffic over a toll bridge covering a considerable period, were admitted to prove the volume or value of such aggregate, without calling the various clerk who handled and had personal knowledge of the transactions. Of this kind of evidence the court said: "Objection is made to the competency of these papers on the idea that they were simply loose memoranda. This cannot be maintained. They were the original and best evidence of the transaction, and were the record kept by the railroad company to show its transactions. In cases of this sort the law does not demand impossibilities. It only demands the best evidence practicable, and no witness could carry in mind these transactions. The only possible way to prove them is from the record kept at the time the transactions occurred." Records of the kind offered and rejected in this case, and now being discussed, were admitted in *Donovan v. B. & M. R. Co.* (Mass.), 33 N. E. 583, *Fireman's Ins. Co. v. Seaboard Air Line Ry.* (N. C.), 50 S. E. 452, and *T. & P. Ry. Co. v. Birdwell* (Tex. Civ. App.), 86 S. W. 1067. Where the witness who made the record is procured, if within the jurisdiction of the court, and testifies that the record offered was made by him in the regular course of the business, that it was his duty to keep such a record, and that its entries were correct when made, nothing appearing to show that the record has since been altered, it is receivable as evidence of the fact it recites; or if the person who made the record be dead, or beyond the jurisdiction of the court, if the record be otherwise proved to be the original entry so kept, it is receivable on the same grounds and to the same extent as any other book or record of original entry.

Witnesses for appellee testified that he was, before his injury,

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a man of industrious habits, sober, and moral. Objection to the testimony was overruled. The court told the jury that this evidence was admitted for the sole purpose of showing the value, if it tended to show it, of appellee's earning capacity, and that they should not consider it for any other purpose. The precise question presented has not heretofore been passed upon by this court. Nor is it all free from difficulty. In favor of its reception it may be said that it helps to show the value of the plaintiff's earning capacity in this: That the arm of a sober, industrious man has greater earning capacity than if he were idle and dissolute. To say that he might not use it to advantage is no more in point than to say he might not use any other special qualification he possessed, such as skill in a particular trade or calling. As he is to be compensated for that which has been wrongfully destroyed or permanently impaired—is to be restored, as far as money can, to the same earning capacity as he was in before the injury—the inquiry necessarily is, what was the money-earning value of the man, but for the injury, and to what extent has it been impaired by it? One earns money, not necessarily because he has two hands and two feet, but because of the use he can put them to in such vocation as he may be qualified for. An ability to do a certain kind of work depends not alone upon knowing how to do it. Skill acquired by experience, his aptitude, and probably the habits of the man, are essential to be considered. If, although skilled and apt, he is the slave of the drugs that unfit him for the work, it would be unjust to allow him to show alone his skill and past experience in the work, without his subsequent deterioration being also admissible. Laborers, and probably as frequently professional men, too, are as often selected by those seeking their services, because of their habits of industry and sobriety as for their skill. It is more probable, all other things being equal, that a sober, industrious man will find employment more constantly than if he were slothful and an inebriate. The earning capacity of the former would therefore be greater, and an injury to his body that permanently impairs his earning capacity would not be fully compensated unless the value of that capacity was actually shown.

On the other hand, it is said, when the injury does not result in death, that compensation for the thing injured is alone contemplated; that habits of industry and sobriety are temperamental—qualities of the mind—and are in no sense injured or lessened by the loss of an arm; that one's inclination to sobriety and industry, being unimpaired by the loss of an arm, will find equivalent employment through other means. Again, it is said the admission of such evidence is more apt to excite commiseration and sympathy for a worthy, unfortunate person, which will work upon the compassion of the jury to award damages not purely compensatory. *Pennsylvania Ry. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 229. It is equally as true that the presence of a maimed, disfigured litigant, who shows that his condition has been produced by the negligent act of a superior, is apt, at times,

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to produce the same effect. The result must be looked to to see whether the verdict is beyond reasonable compensation, when, if it is, the remedy lies in the corrective power of the court. Still, it is the province of the jury, and the right of the plaintiff, to have his case tried on its merits by the jury, notwithstanding possible danger of abuse of the right. A further objection is that the evidence is said to support the good character of the plaintiff as a witness, which is not allowed until his reputation has been attacked by the defendant. In the case at bar, the court admonished the jury as to the sole purpose for which the testimony was admitted, excluding, so far as was possible, the element of supporting evidence.

It is argued, however, that it would inevitably follow from the admission of the evidence that the jury would give the testimony of such a plaintiff greater consideration, because of such an established character, than they probably would have done in its absence. It is also true that, where the jury know a litigant who testifies in his own behalf, they may give greater credit to his testimony because of their favorable acquaintance than if they did not know him, which is allowable. In any case where it would be permissible to prove the previous good character of the plaintiff for any purpose, as in case of slander or libel, it would not become an irrelevant fact because the jury might consider it also in the quantum of credit they should give his testimony as a witness. In *Sutherland on Damages*, § 1268, it is said that the facts and circumstances to be considered in estimate of damages are the age, health, condition in life, occupation, habits of industry and sobriety, mental and physical capacity, disposition to frugality, opportunities and customary earnings of the deceased and his expectation of life. It was held in *Texas-Mexican Ry. Co. v. Douglas*, 73 Tex. 325, 11 S. W. 333, that the rule should be applied also to a personal injury case, where there was a permanent impairment of the power of the plaintiff to earn money. To the same effect are *Central of Ga. Ry. Co. v. Perkerson* (Ga.) 38 S. E. 965, 53 L. R. A. 210; *Cent. R. R. Co. v. Thompson*, 76 Ga. 770; *Baltimore & Ohio R. R. Co. v. Wightman's Adm'r*, 29 Grat. (Va.) 431, 26 Am. Rep. 384; *Baltimore & R. T. v. State*, 71 Md. 573, 18 Atl. 884; *Ohio & M. Ry. Co. v. Voight*, 122 Ind. 288, 23 N. E. 774. We do not mean to say here that the rule quoted from *Sutherland* above should be applied in this state further than it has heretofore been approved by this court, and as now approved on the subject of "habits of industry and sobriety." It follows that the converse of the proposition advanced must be equally true; that is, that it is permissible to prove by way of diminution of damages that the plaintiff was an habitually lazy and drunken person. It was so held in *Cleveland & P. R. R. Co. v. Sutherland*, 19 Ohio St. 151. We think, though, the admission of all such evidence should be accompanied by a strict admonition from the court as to the purpose for which it is admitted. Nor should it, when it goes directly to the moral reputation of the plaintiff, be ad-

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mitted at all, as whether he is a moral person or immoral, unless introduced properly as impeaching evidence or in rebuttal to such. The evil that would probably result from the admission of such evidence on behalf of a plaintiff in chief outweighs its good. It would be clearly within the rule against receiving evidence to support a party's character before it had been attacked. That class of testimony which was admitted in this case should have been excluded.

The court is further of opinion that a new trial should have been granted in this case because the verdict was palpably against the weight of the evidence.

Judgment reversed, and cause remanded, with directions to award a new trial under proceedings not inconsistent herewith.

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(Supreme Court of Minnesota, Nov. 23, 1906.)

[109 N. W. Rep. 835.]

Evidence—Positive and Negative Testimony—Railroads—Accidents at Crossing—Signals.*—When it is alleged that the bell on a locomotive was not rung as the train approached a crossing, the evidence of witnesses who were present, conscious, in the possession of their physical senses, and listening for signals, that they did not hear it ring has probative value sufficient to take the issue to the jury, although other witnesses testify that the bell did ring.

Negligence—Imputed Negligence.†—When a person employs a livery team with a driver to carry him to a specified place, the relation of master and servant does not exist between the passenger and the driver. They are not engaged in a common employment or a joint enterprise, and the negligence of the driver, in driving upon a railway track without taking proper precautions to ascertain the approach of a train, is not imputable to the passenger. The latter, however, is responsible for his own personal negligence.

Same.‡—The primary duty of caring for the safety of the vehicle and passengers rests upon the driver, and, unless the danger is obvious or is known to the passenger, the latter may rely upon the as-

*See foot-note appended to *Baltimore & O. R. Co. v. Baldwin* (C. C. A.), 21 R. R. R. 380, 44 Am. & Eng. R. Cas., N. S., 380; foot-notes appended to *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Keiser v. Lehigh Valley R. Co.* (Pa.), 20 R. R. R. 303, 43 Am. & Eng. R. Cas. 303.

†See foot-note appended to *Kane v. Boston Elev. Ry. Co.* (Mass.) 20 R. R. R. 581, 43 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Jacksonville Electric Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

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sumption that the driver will exercise proper care and caution in approaching a place of danger. But, if the passenger knows that the driver is incompetent or careless, or sees that the driver is not aware of the danger and is not taking proper precautions, it is his duty to notify him of the danger and a failure to do so is negligence.

(Syllabus by the Court.)

Appeal from District Court, Pipestone County; P. E. Brown, Judge.

Action by Clarence H. Cotton against the Willmar & Sioux Falls Railway Company. Verdict for plaintiff. From an order denying new trial, defendant appeals. Affirmed.

Wm. R. Begg, C. H. Winsor, and W. F. McNaughton, for appellant.

Janes & Janes, for respondent.

ELLIOTT, J. On the evening of December 21, 1905, the respondent, Cotton, engaged a livery team and driver to take him from Bell Rapids, S. D., to Jasper, Minn. The vehicle was a common, single-seated, two-horse buggy, and the driver was a young man about 19 years of age who had had experience and was familiar with the route over which they were to pass. By the time they reached the village of Jasper it was dark and the lights were burning in the streets and houses. The weather was cool, the top of the buggy up, and the side and back curtains were drawn. Both the respondent and the driver wore heavy coats, with the collars turned up but not in such manner as to interfere materially with their hearing. Wall street, upon which they entered the village, crosses the appellant's railway track at a point about seven rods east of where the street crosses a bridge or culvert. The street runs east and west and the railway track extends practically north and south. The depot building is on the east side of the track and just south of the street crossing. When the team was between 50 and 70 rods from the track, both the respondent and the driver heard the whistle of a locomotive. They continued on at a brisk pace until they crossed the bridge when the team was brought to a walk and the respondent leaned forward and looked and listened for the approaching train. At the same time the driver who sat on the respondent's right, toward the south, also looked out and listened for the train. It does not appear that the driver saw anything or made any remark, although the engine of the train must have then been behind, and concealed from view by, the station building and the train extending towards the south where it would have been visible in the daytime. The respondent, however, saw a light some 600 or 700 feet up the track to the northward, which he assumed to be the headlight of a locomotive and said, "There is the headlight." Assuming apparently, that they had ample time to cross the track before the train would come that distance, both parties settled back in the seat, the driver touched the horses with the whip and drove rapidly upon the track. They

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were struck by the train coming from the south and the respondent sustained injuries for which he recovered a verdict for \$5,000. The appeal is from an order denying a motion by the railway company for judgment notwithstanding the verdict or for a new trial.

The appellant contends that the evidence was not sufficient to establish negligence on the part of the railway company, but showed conclusively that the accident was caused by the negligence of the respondent in failing to use the proper care for his own safety. The complaint alleges as negligence (a) that the defendant ran the train over the street at a dangerous and unusual rate of speed; (b) failed to provide the engine with proper headlight; (c) neglected to keep a watchman at the crossing; and (d) failed to give any signal of the approach of the train. These claims were all submitted to the jury, but upon this appeal it is conceded that, if the railway company was negligent, it was in failing to ring the bell as the train approached the crossing. The appellant contends (1) that there was no substantial evidence tending to show that the bell was not rung; (2) that the evidence showed that the respondent personally participated in the acts and controlled the driver in the management of the team, and was thus guilty of contributory negligence; (3) that the court erroneously charged the jury as to the burden of proof and as to the relation between the driver and the respondent; and (4) that the verdict was excessive.

1. The allegation being that the bell was not rung it was competent to prove the negative fact by the testimony of competent witnesses who were so situated that they might, and probably would, have heard the sound had the bell been rung. The plaintiff alleged, and was required to prove, that the bell did not ring. The fact in issue was whether at a certain time and place certain sounds were produced. Silence is as much a fact as sound and the proof of one disproves the other. If a witness heard a sound the necessary implication is that he was where he could hear the sound, but the fact that a witness did not hear a sound carries with it no such implication. Therefore when it is sought to prove the nonexistence of sound by the testimony of witnesses the conditions of sound by the testimony of witnesses the conditions essential to the competency of the evidence must be supplied. The probative value to be given to the fact that a witness did not hear the sound depends upon the condition of his senses, his proximity to the place, the degree of attention, and other such circumstances which render it more or less probable that, if the sound had been made, the witness would have heard it. Hence the mere statement of a witness that he did not hear a bell ring is valueless as evidence, unless it further appears that he was able to hear and was in a position and under conditions where he would probably have heard the sound had it been made. The degree of attention will affect the value of the evidence, but the fact that the witness was not giving his direct attention at the time for the purpose of learning whether signals

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were given will not destroy the value of the evidence if he was present at the crossing, was conscious, and in possession of his ordinary senses, and testifies positively that he heard no signal. The testimony of a witness that he did not hear a bell rung is thus of itself, as against direct and positive testimony of another that the bell did ring, no evidence that it did not ring, but, taken in connection with evidence showing that the witness could and probably would have heard it, had it been rung, and that he was listening to hear it ring, is evidence that it did not ring. The position and situation of the witnesses, the attention they were giving, and their credibility, and the weight of the evidence are questions for the jury. *Moran v. Eastern Ry. Co.*, 48 Minn. 46, 50 N. W. 930; *Green v. Eastern Ry. Co.*, 52 Minn. 79, 53 N. W. 808; *Peterson v. Mpls. Street Ry. Co.*, 90 Minn. 52, 95 N. W. 751; *Tenn. etc., R. Co. v. Hansford*, 125 Ala. 349, 28 South. 45; *Dyer v. Erie Ry. Co.*, 71 N. Y. 236; *Johanson v. Boston & M. Ry. Co. (Mass.)* 26 N. E. 426; *Walsh v. Railway Co.*, 171 Mass. 52, 50 N. E. 453; *Marcott v. Railway Co.*, 49 Mich. 101, 13 N. W. 374; *McLean v. Erie Ry. Co.*, 69 N. J. Law, 57, 54 Atl. 238; *Id.*, 70 N. J. Law, 337, 57 Atl. 1132; *Goodwin v. Central Ry. Co. (N. J. Err. & App.)* 64 Atl. 135; *Northern Central R. Co. v. State (Md.)* 60 Atl. 19; *Purnall v. R. Co.*, 122 N. C. 832, 29 S. E. 953; *Reed v. Chicago, etc., R. Co.*, 74 Iowa, 188, 37 N. W. 149; *Atchison, etc., R. Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036; *Chicago, etc., R. Co. v. Eganolf*, 112 Ill. App. 305; *McDuffie v. Lake Shore, etc., R. Co.*, 98 Mich. 356, 57 N. W. 248; *Murray v. Mo. Pac. R. Co.*, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601. Such evidence, while negative in form, is affirmative in substance. *Grabill v. Ren*, 110 Ill. App. 587. The cases cited by appellant are not inconsistent with this rule, as a careful examination of the facts of each case will disclose that some essential element was absent. In *Bohan v. Railway Co. (Wis.)* 21 N. W. 241, and *Tully v. Fitchburg Ry. Co.*, 134 Mass. 499, stress is laid upon the inadequacy of such evidence. The substance of these decisions is that it is not enough for a witness to say merely that he does not remember having heard a bell. "Courts have often been asked," says Wigmore, "to exclude testimony based on what may be called negative knowledge—i. e., testimony that a fact did not occur—founded upon the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests upon the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requisite is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." Wigmore, *Evidence*, vol. 1, § 664; Elliott, *Ev.* vol. 2, § 969; Thompson, *Negligence*, vol. 6, § 7865; 5 *Current Law*, 1369. The evidence was sufficient to justify the court in submitting the question to the jury. The engineer and fireman, witnesses for the defendant, testified that the bell was rung in

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the usual manner as the locomotive approached the street crossing. The defendant's witness Larson, who stood on the crossing, saw the team approaching, appreciated the danger of an accident, and shouted to the occupants of the buggy to stop, was not asked with reference to the ringing of the bell, although he testified that he heard the whistle blow and saw the headlight of the locomotive. The respondent and the driver testified that they did not hear the bell ring. There was evidence that they were within a few rods of the approaching engine, the night was dark and frosty; there was but little wind blowing; they were listening for the approach of an expected train; their minds were in a condition under which it is more than probable that they would have heard the ringing of a bell on an engine coming from the south although they understood that the train was approaching from the north; they were conscious; were in the exercise of the ordinary senses; and their sense of hearing was not materially affected by their coat collars. Under all the circumstances the jury might reasonably infer that they would have heard the bell if it had been rung.

2. While the appellant does not contend that the doctrine of imputed negligence applies, the argument would lead to the imposition of a duty upon the passenger in excess of that which has been approved by this court. In *Thoroughgood v. Bryan*, 8 M. G. & S. 114, it was held that a passenger upon the vehicle of a common carrier who sustains an injury, which is the result of the concurrent negligence of the person in charge of such vehicle and a third person, is so identified with the driver as to be chargeable with his negligence in an action against the latter. This case was followed with some modifications by a few American courts, notably Wisconsin and Michigan. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558; *Olson v. Luck*, 103 Wis. 33, 79 N. W. 29; *Mullen v. Owosso*, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436. In *Follman v. City of Mankato*, 35 Minn. 522, 29 N. W. 317, 59 Am. St. Rep. 340, this court refused to accept the doctrine of imputed negligence. It there appeared that the plaintiff was riding in a private carriage at the invitation of the owner and was injured by the concurrent negligence of the driver and a third person. The theory of the identity of the passenger and the driver upon which the English case rested, had it been adopted, would have prevented a recovery upon the facts, but it was held that as the plaintiff was without fault and had no authority over the driver, she could recover. Mr. Justice Dickinson noted the fact that *Thoroughgood v. Bryan* had been subjected to criticism in England, and in the following year, after very elaborate consideration, the doctrine was repudiated by the Court of Appeals in the case of *The Bernine*, 12 L. R. Prob. Div. 58 (1887). The American courts have very generally declined to approve the doctrine of *Thoroughgood v. Bryan* but have not been able to agree upon the extent of the duty which rests upon a person who rides in a vehicle which is driven by a person over whom he has no direct

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control. *Bennett v. N. J. Ry. Co.*, 36 N. J. Law, 225, 13 Am. Rep. 435; *Western Ry. Co. v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126; *Becke v. Railway Co.*, 102 Mo. 548, 13 S. W. 1053, 9 L. R. A. 157. One group of cases charges the passenger with the absolute duty of keeping a lookout for his own safety, and does not permit him to trust to the care of the driver, while another allows him to rely upon a driver, whom he believes to be careful and competent, without being subject to the implication of negligence. 2 Thompson, Neg. § 1621, and cases there cited. But the rule which has met with general approval in the more recent cases makes the passenger responsible only for his personal negligence, and leaves it to the jury to determine whether, under the circumstances, he was justified in trusting his safety to the care of the driver and not looking and listening for himself. The negligence of the driver is thus not imputed to the guest or passenger, but the circumstances may be such as to make it the duty of the passenger to look and listen and attempt to control the driver for his own protection. The passenger is thus held responsible for his own negligence but not for the negligence of the driver. He must exercise due care and caution, and, if his negligence contributes approximately to the accident, he cannot recover damages. *West Chicago, etc., Ry. Co. v. Piper*, 165 Ill. 325, 46 N. E. 186; *Mo., etc., Ry. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Whitman v. Fisher*, 98 Me. 575, 57 Atl. 895; *Indianapolis Street Ry. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571; and cases collected in a note to *Colorado, etc., R. Co. v. Thomas* (33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681) 3 Am. & Eng. Ann. Cas. 703. In *Ill. Cent. Ry. Co. v. McLeod*, 78 Miss. 334, 29 South. 76, 52 L. R. A. 954, 84 Am. St. Rep. 630, it was said that, where the danger is apparent, the passenger is chargeable with the duty of taking some action to control the conduct of the driver. In *Crescent Township v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. St. Rep. 367; and *Dean v. Penn. Ry. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733, it was held that where the danger is obvious or the passenger has knowledge of its existence, he is chargeable with negligence. In *Dryden v. Penn. Ry. Co. (Pa.)* 61 Atl. 249, it was said that the immunity of the passenger "is not absolute to the extent of excusing reasonable caution in the face of patent danger." A passenger certainly would be negligent if he relied on a driver who was known to be intoxicated or otherwise incompetent. *Roach v. Railway Co.*, 93 Ga. 785, 21 S. E. 67; *Meenagh v. Buckmaster*, 26 App. Div. (N. Y.) 451, 50 N. Y. Supp. 85. Many other cases might be cited to illustrate the rule that a guest or passenger riding in a vehicle with a driver, over whose conduct he has no rightful control, is required, nevertheless, to exercise reasonable care for his own safety. In *Howe v. Mpls., etc., Ry. Co.*, 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616, the court said: "We think that it would hardly occur to a man of ordinary prudence while riding as a passenger with a competent driver, who he had no reason to suppose was

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neglecting his duty, that he was required when approaching a railway crossing to exercise the same degree of diligence in looking and listening for approaching trains that he would if he himself had the control and management of the team, and our conclusion is that a court cannot hold, as a matter of law, that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in looking and listening at a railway crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that, under ordinary circumstances, passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting the hard and fast rule that they are guilty of negligence in so doing. Every case must stand largely upon the particular facts." This rule which makes the negligence of the passenger, under all the circumstances, a question for the jury was applied in *Johnson v. St. Paul, etc., Ry. Co.*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; *Finley v. Chicago, etc., Ry. Co.*, 71 Minn. 471, 74 N. W. 174; *Wosika v. St. Paul City Ry. Co.*, 80 Minn. 364, 83 N. W. 386; *Lammers v. G. N. Ry. Co.*, 82 Minn. 120, 84 N. W. 728; *Cunningham v. Thief River Falls*, 84 Minn. 21, 86 N. W. 763. The question of the respondent's contributory negligence was thus for the jury to determine unless the evidence was such as to require the court to determine it as a question of law.

(3) The appellant contends that the court erroneously instructed the jury as to the relation which existed between the respondent and the driver. The rule that the driver's negligence is not imputable to a person who is being carried in a vehicle is only applicable in cases where the relation of master and servant or principal and agent does not exist. The negligence of a person's own driver is imputable to him. *Markowitz v. Metropolitan St. Ry. Co.*, 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; *Read v. City, etc., Ry. Co.*, 115 Ga. 366, 41 S. E. 629. So where the parties are engaged in a joint enterprise or in a common employment the negligence of one is imputable to all. *Boyden v. Fitchburg, etc., Ry.*, 72 Vt. 89, 47 Atl. 409; *Donnelly v. Brooklyn City Ry. Co.*, 109 N. Y. 16, 15 N. E. 733. In *Cunningham v. Thief River Falls*, 84 Minn. 27, 86 N. W. 763, the court said: "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movement and conduct of each of them with respect thereto. Each must have some voice and right to be heard in its control and management." These parties were not engaged in a joint enterprise, neither did the relation of principal and agent or master and servant exist between them. The respondent had contracted to be conveyed to Jasper for an agreed consideration. He was a passenger in a

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quasi public conveyance, and had no rightful control over the actions of the driver. Neither party had the right to direct the movements of the other. The respondent asked the liveryman at Bell Rapids what he would charge to take him to Jasper, and was informed that he would do it for \$2.50. Later in the day he telephoned for the team and the liveryman sent it with Nelson as driver. The driver was the servant of the liveryman. This is all the evidence as to the contract of hiring, and it fails to show any relationship which would charge the respondent with responsibility for the actions of the driver. In *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583, it was held that the relationship of master and servant was not created by a mere contract for conveyance in a livery team. The court said: "Whether the hack and driver were hired at a public stand or of a private person could make no difference, nor whether the party furnishing them was engaged in the business of a common carrier or not." See, also, *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; *Lewis v. Long Island Ry. Co.* (N. Y.), 56 N. E. 548; *Bluder v. Transit Co.*, 189 Mo. 139, 88 S. W. 648, and *Quarman v. Burnett*, 6 M. & W. 449. A careful examination of the evidence satisfies us that the question of respondent's contributory negligence was under all the circumstances for the jury to determine. It differs very materially from the case of *Shindelus v. St. Paul, etc., Ry. Co.*, 80 Minn. 364, 83 N. W. 386, in which it appeared that the plaintiff neither looked, listened, nor took any precautions whatever for his own protection. It is claimed that the respondent actively participated in the negligence of the driver. The respondent did not assume to control the actions of the driver unless it was by the statement or exclamation with reference to the headlight. It is evident that this statement did not cause the driver to relax his vigilance or induce him to do anything that he would not otherwise have done. He had himself leaned forward and looked in the direction from which the train was approaching. The respondent's statement may have prevented him from looking to the north, but this was of no consequence as the train was not coming from that direction. There was evidence tending to show that the respondent looked and listened for an approaching train; that he saw a light which he erroneously assumed to be the headlight of an approaching locomotive; that he looked and listened for the approaching train; that, had the light seen by him been the headlight, there would have been ample time to cross the track without injury; that he observed the driver looking and listening, and there was nothing to show that he had any reason for doubting that the driver was an ordinarily cautious and competent person. Considering all the circumstances in connection with the fact that the respondent's attention was diverted to the light which he erroneously assumed to be the headlight of the locomotive of the approaching train (*Peterson v. Mpls. St. Ry. Co.*, 90 Minn. 52, 95 N. W. 751), it is apparent that there was sufficient evidence to take the issue of contributory negligence to the jury

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and to sustain its finding that the respondent was not guilty of contributory negligence.

(4) While the amount of damages awarded is liberal, it is not so excessive as to justify us in interfering with the order of the trial court.

The other assignments of error have been carefully considered and found without sufficient merit to justify a reversal.

The order from which the appeal is taken is therefore affirmed.

MANKEWICZ v. LEHIGH VALLEY R. Co.

(Supreme Court of Pennsylvania, March 12, 1906.)

[63 Atl. Rep. 604.]

Railroads—Accident at Crossing—Duty of Traveler.*—Where a traveler, in approaching a railroad track, stops, but cannot see by looking from vehicle any distance up the track, he must get out and walk to a place where he can see.

Same—Evidence.—In an action for injuries at a crossing, evidence held to sustain judgment of nonsuit.

Appeal from Court of Common Pleas, Schuylkill County.

Action by William Mankewicz against the Lehigh Valley Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

R. H. Koch, for appellant.

Guy E. Farquhar and *Otto E. Farquhar*, for appellee.

FELL, J. The plaintiff was injured at a grade crossing of the defendant's road where there were four tracks in the borough of Shenandoah. He was familiar with the crossing, knew that the watchman was not at that time on duty, and that a train was about due. He was driving two horses to a sleigh in which a number of persons were riding, and when he reached the crossing freight cars were standing on the track nearest him, on either side of the street. He stopped close to this track and looked and listened. He was unable to see an approaching train because of the freight cars and, hearing none, he drove on. The front part of the sleigh was struck by the engine of a passenger train on

*For the authorities in this series on the question of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-notes appended to *Stokes v. Southern R. Co.* (Va.), 18 R. R. R. 731, 41 Am. & Eng. R. Cas., N. S., 731; *Brammer v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

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the third track, about 40 feet from the place where he had stopped. The train was near the station, running slowly, and stopped within 30 feet of the place of the collision. The time was 6 o'clock in the evening in the early part of February and it was snowing. The situation was thus clearly summarized by the learned trial judge: "A man approached a railroad crossing which he confessedly knew to be dangerous, he knew the gates were up and the watchman no longer on duty; he knew that a train was about due, stopping at a place where admittedly he could not see; making no further efforts to advise himself of the true condition of the surroundings, he drove upon the track and was injured." The rule that a traveler before attempting to cross the tracks of a steam railroad must stop, look and listen is not complied with by stopping where he cannot see. The rule is one of law, absolute and unbending, and must be complied with in good faith for the accomplishment of the end in view. Where a stop has been made at the usual place for stopping, from which a view of the tracks can be had, it is generally a question for the jury whether under the facts of the particular case there was negligence in not stopping longer or at another and better place. *Ely v. Pittsburgh, etc., Ry. Co.*, 158 Pa. 233, 27 Atl. 970. There has been no departure from the rule that if a driver cannot see by looking from the vehicle in which he is riding he should get out and walk forward to a place where he can see. There should be no departure from it. Stopping where an approaching train cannot be seen is but little better than not stopping at all, and is not an observance of the duty to stop, look, and listen. In the recent case of *Kinter v. Penna. Railroad Co.*, 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795, the authorities on the subject were reviewed by Justice Brown, and it was shown that the principle has been uniformly recognized in the cases following *Penna. Railroad Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753.

The judgment is affirmed.

HARRISON v. ALABAMA MIDLAND RY. CO.

(Supreme Court of Alabama, Jan. 17, 1906. Rehearing Denied April 3, 1906.)

[40 So. Rep. 394.]

Appeal—Questions Reviewable—Motions to Strike Out.—A motion to strike out pleas and rulings thereon cannot be considered, when neither pleas nor rulings are set out in the bill of exceptions.

Same.—Where pleas were amended after demurrers were interposed, and it did not appear that the demurrers were afterwards interposed, the sufficiency of the pleas cannot be reviewed.

Railroads—Establishment of Relief Department—Ultra Vires.*—The act of a railway company in assisting to organize and maintain a relief and hospital department, whereby injured employees are furnished medical treatment, paid weekly benefits while injured, and a stipulated sum paid to the family of the employee in case of his death, is not ultra vires.

Master and Servant—Employers' Liability Act.†—The employers' liability act has no application to the maintenance of a hospital and relief department by railroads.

Release—Attack for Fraud—Return of Consideration.†—Where a master pays a servant a certain sum in satisfaction of claim for personal injuries, the servant cannot attack the settlement as fraudulent without offering to return the sum paid.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.
"To be officially reported."

Action by Gladden Harrison against the Alabama Midland Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

William L. Martin, for appellant.

J. M. Chilton and *A. A. Wiley*, for appellee.

HARALSON, J. This action is for the recovery of damages for personal injuries. No objection was raised to the sixth count in the complaint. The defendant filed six pleas. The first was the general issue, and the third was withdrawn, leaving special pleas, 2, 4, 5, and 6.

A motion was made to strike pleas 5 and 6, but the motion, pleas and the rulings thereon cannot be considered, as they are

*For the authorities in this series on the question whether it is within the implied powers of a railroad corporation to establish a relief association for the benefit of its employees, see foot-note appended to *State v. Pittsburgh, etc., Ry. Co.* (Ohio), 9 R. R. R. 168, 32 Am. & Eng. R. Cas., N. S., 168.

†For the authorities in this series on the subject of the effect of an employee's acceptance of relief department benefits, see foot-note appended to *Chicago, etc., R. Co. v. Olson* (Neb.), 10 R. R. R. 209, 33 Am. & Eng. R. Cas., N. S., 209.

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not set out in the bill of exceptions. *Cottingham v. Greely Barnham Grocery Co.*, 129 Ala. 200, 30 South. 560, 87 Am. St. Rep. 58.

Demurrers were interposed to pleas 3 and 4 as originally filed. Each plea was afterwards amended, and it does not appear that the demurrers were afterwards interposed to the pleas as amended, and they cannot, therefore, be reviewed. *L. & N. R. Co. v. Woods*, 105 Ala. 561, 17 South. 41. However, the grounds of objection to the original pleas were obviated by the amendments. This leaves for consideration the demurrers to the fifth and sixth pleas.

Adopting what is correctly said of these pleas by appellee's counsel in their brief, as to the substantial contents of those pleas, it may be said: "The fifth plea sets up the existence of an association composed of the defendant company and other railway companies, under the designation of the Relief & Hospital Department of the Plant System." The plea sets up the purpose of this organization, and the manner in which the contributions made by the companies themselves and its employees are to be conserved and dispensed. Each employee contributes a stated sum per month. To this, the associated companies add \$1,000.00 per month, which amounts to \$12,000.00 per year, and in addition guaranties the payment of all the benefits that may accrue to employees under the terms of the contract. In case of injury not causing death, employees are entitled to medical and surgical treatment at the hospital, provided for and maintained, furnished medicines, etc., while under such treatment, and are, besides, to be entitled to a certain weekly indemnity. In case of death, the benefit consisted of a sum certain, to be paid to the family of deceased. The articles and purposes of the organization are fully set out in the plea. By the terms of the contract (of one becoming a member) the employee had the right, upon being injured, to determine whether he would accept the benefits arising from their joint contributions by the companies and the employees, or whether he would bring his suit to recover damages for any negligence which he might claim occasioned his injuries. In case of his death, his representatives had the same right of choice.

The plea alleges that the plaintiff, Gladden Harrison, after he was injured, and before bringing suit, accepted the benefits to which he was entitled by the terms of this contract, and sets up the fact of such acceptance as a final and conclusive bar to his right afterwards to maintain a suit for damages for his alleged injuries.

The sixth plea in somewhat different language, sets up the same contract, but adds that it was one of its terms, that its construction and effect should be determined by the laws of Georgia. It then proceeds to show, that there was no statute law of Georgia applying to such contracts, but that a contract substantially the same in its provisions and made with the same department, was construed and its effect determined by the Su-

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preme Court of the state of Georgia, which was the highest court of the state, in the case of *Petty v. Brunswick, etc., R. R. Co.* reported in 109 Ga. 666, 35 South 82. The decision in that case is attached as an exhibit to the plea, and made a part of it.

The pleas were demurred to on numerous grounds, the main contention raised by demurrer being, that the contract between the plaintiff and the Relief & Hospital Department of the Plant System, and with the Alabama Midland Railway Company, as a constituent member of that association, is invalid, on the grounds that the establishment of such a department is ultra vires; that there was no consideration for entering into the contract, and that the acceptance of the benefits of the same by the plaintiff did not constitute a binding election which prevented him from afterwards bringing and maintaining a suit to recover damages for his alleged injuries.

The contract of the plaintiff provides, that the associated companies shall contribute annually the sum of \$12,000.00 as a benefit fund of the association, supplemented by monthly contributions from the employees. This wears the appearance of stability on which an employee may rely for the guaranteed relief, in case he should choose to become a member of the association. By the scheme of relief the employee, or his representative in case of accident or death, is offered the choice to be voluntarily exercised by him, of accepting indemnity provided for him by the company and other employees, or refusing such indemnity and bringing suit to recover damages for his injuries.

We have been pointed to nothing in the charters of either of the companies which would prevent them from establishing such a relief hospital. The primary object of a railroad company is to build, equip and operate its line for the transportation of freight and passengers. In doing so, a vast number of employees are employed, all of whom, while in service on the line, are subject to dangers in multiplied forms, and to physical injuries, for which the companies are subjected to liability, and the injured often to irreparable loss. Any device or improvement which prevents or is intended to prevent these evils, is incident to the due exercise of their powers, and clearly within the scope of their organization. A ground on which this right is assailed is, that the scheme is an insurance business; but this is a mistake. It does not purport to be an insurance company. The benefits are in the way of relief in cases of sickness, accident or death, and is a beneficial and not an insurance association, as has been expressly held. *Donald v. C. B. Ry. Co.*, 93 Iowa, 295, 61 N. W. 971, 33 L. R. A. 492; *Com. v. Equitable Association*, 137 Pa. 412, 18 Atl. 1112; *Association v. Jones*, 154 Pa. 99, 26 Atl. 253.

The validity of the establishment of such relief associations by railroad companies, have been the subject of frequent adjudications in many of the states of the Union. The decision in the case referred to in the sixth plea (*Petty v. Brunswick, etc., Ry. Co.*, 109 Ga. 666, 35 South. 82), is a full, clear and able decision of all the main questions involved in this case, and which con-

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strues the validity of the same contract we have before us. The contract as the court says, "Did not, as claimed, in any of its terms or conditions stipulate that the defendant company should be absolved from the legal consequences of its own negligence or that of its servants. On the contrary, it merely provided an additional remedy to that given by law to all employees who might suffer injury by reason of the negligence, actual or imputable, of his master. The latter remedy was left intact, undisturbed and unimpaired, and the injured employee might, or might not, at his option, take advantage thereof. True, he could not avail himself of both, but was put upon his voluntary election as to which of the two he would pursue. This feature of the contract is not only technically permissible, but is in perfect harmony and accord with that fundamental rule of law, based upon sound and sensible considerations of public policy, which contemplates that indemnity, rather than the mere chance of speculative gain, should be the primordial purpose of every contract designed to afford protection to a party thereto in the event he sustains loss or injury. Only in case the injured employee commits an error of judgment in determining whether he will accept benefits which, though comparatively small, are yet sure and easily within his grasp, or will hazard the less certain result of a suit for damages, can he possibly fail to realize all the fruits of every right given him by law. That it is conceivable that he may make such mistake, does not render the contract essentially or inherently vicious, and, therefore, opposed to public policy. A much more extended argument on the line just suggested might be presented, but we deem it wholly unnecessary. The question under discussion is not a novel one, but has been heretofore thoroughly sifted, minutely analyzed and satisfactorily determined by a number of the ablest courts in the country. For further light thereon, we refer those entertaining unsatisfied doubts to the following adjudications, wherein the whole subject, in all its various phases, has been fully and exhaustively dealt with. *Eckman v. R. R. Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; *Johnson v. R. R. Co.*, 163 Pa. 127, 29 Atl. 854; *Ringle v. R. R. Co.*, 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628; *Spitz v. R. R. Co.*, 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423; *Pittsburgh R. R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *P. C. C. & St. L. Ry. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; *Donald v. R. R. Co.*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Maine v. R. R. Co. (Iowa)* 70 N. W. 630; *Chicago R. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Chicago R. R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; *Johnson v. Ry. Co.*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645; *Owens v. R. R. Co. (C. C.)* 35 Fed. 715, 1 L. R. A. 75; *State v. Railroad Co. (C. C.)* 36 Fed. 655; *Otis v. Pennsylvania Co. (C. C.)* 71 Fed. 136; *Shaver v. Pennsylvania (C. C.)* 71 Fed. 931."

The demurrers to the pleas were properly overruled.

It is insisted, however, that the existence of the employer's

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liability act in this state, which does not exist in Georgia, makes this case a different one from that presented in the other states. We are unable to understand how the contract in question contravenes the employer's liability act, but on reasoning and principle it seems that that act can have no effect on the general principle. *P. C. C. & St. L. Ry. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641.

The other questions in the case arise mainly on sustaining demurrers to plaintiff's replications to defendant's pleas.

The second plea, as amended sets up, that after the accident complained of, and on the 1st of May, 1900, the defendant paid plaintiff \$33.33 in compromise, settlement and release of the claim of the plaintiff sued for, and plaintiff then and there, in consideration of said sum, executed a release to defendant. The written release is made an exhibit to the plea, and recites, that in consideration of the payment of said sum of money, plaintiff compromised said claim and acquitted, discharged and released the defendant, its officers, agents and employees of and from any and all liability for said injury or any results, direct or indirect, rising therefrom, and acknowledged full accord and satisfaction therefor, etc.

The fourth plea as amended, sets up, in substance, that after said accident, and before the commencement of this suit, the plaintiff agreed with defendant, that if defendant would employ plaintiff and pay him at the rate of \$50.00 per month he would accept the same with the sum of \$33.33 paid plaintiff by defendant, to wit; on the 1st day of May, 1900, in settlement of the claim sued upon, and avers, that it did so employ plaintiff and did pay him for his services at the rate of \$50.00 per month, for and including the month of April, 1901, and including four days in March, 1900, when the plaintiff voluntarily left defendant's service and afterwards brought this suit, on the 16th, day of March, 1901.

The plaintiff demurred to the pleas, which being overruled, he replied in substance that said release was procured by the fraud of defendant and its agents. The defendant demurred to the replications on many grounds, among them being the one, that "it is not denied in said replication but that plaintiff knew, some time after he signed said release, what its provisions were, and there is no averment that he ever returned or offered to return the said sum alleged to have been paid him." It is alleged in said plea and not denied in said replication that plaintiff was paid by defendant said sum of \$33.33, and it is not alleged in said replication that plaintiff has ever returned or offered to return said money," nor did he offer to rescind said contract, though he knew what the provisions of said release were.

The demurrers to the replications were sustained.

In *Stephenson v. Allison*, 123 Ala. 447, 26 South. 292, it is said, quoting from another case: "If the party defrauded would disaffirm the contract, he must do so at the earliest practical moment after discovery of the cheat. This is the time to make his election and it must be done promptly and unreservedly. He

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must not hesitate; nor can he be allowed to deal with the subject-matter of the contract and afterwards rescind. The election is with him—he may affirm or disaffirm the contract but he cannot do both; and if he concludes to abide by it, as upon the whole advantageous, he shall not afterwards be permitted to question its validity. The party who would disaffirm a fraudulent contract must return whatever he has received from it. This is on a plain and just principle. He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue; but must rescind in toto, if at all.” *Masson v. Bo-vet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Dill v. Camp*, 22 Ala. 249; *Burnett v. Stanton*, 2 Ala. 181.

We find no error in the ruling sustaining the demurrers to the replications.

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* DAVENPORT *et al.*

(Supreme Court of Arkansas, Oct. 8, 1906.)

[96 S. W. Rep. 994.]

Master and Servant—Injuries to Third Persons—Independent Contractor—Burden of Proof—Railroads.*—Where damage to plaintiffs' farm lands in the construction of defendant's railroad right of way were inflicted by those engaged in the construction of the railroad for the company, the burden was on the latter to show that the injuries were done by an independent contractor, for whose conduct the railroad was not responsible, in order to avoid liability.

Appeal from Circuit Court, Marion County, Elbridge G. Mitchell, Judge.

Action by S. A. Davenport and another against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

B. S. Johnson, for appellant.

Woods Bros., for appellees.

MCCULLOCH, J. The plaintiffs, S. A. Davenport and W. L. Davenport, brought this action against the St. Louis, Iron Mountain & Southern Railway Company and J. H. Reynolds, contractor, and Ben Reynolds, subcontractor, for alleged damages done to the plaintiffs' farm lands in constructing the railroad

*For the authorities in this series on the subject of the liabilities of railroad companies for the negligence of an independent contractor, see foot-notes appended to *Boyd v. Chicago & N. W. Ry. Co.* (Ill.), 20 R. R. R. 154, 43 Am. & Eng. R. Cas., N. S., 154; *Montgomery St. Ry. Co. v. Smith* (Ala.), 19 R. R. R. 131, 42 Am. & Eng. R. Cas., N. S., 131; *Gossett v. Southern Ry. Co.* (Tenn.), 18 R. R. R. 706, 41 Am. & Eng. R. Cas., N. S., 706; *Lookout Mountain Iron Co. v. Lea* (Ala.), 19 R. R. R. 10, 42 Am. & Eng. R. Cas., N. S., 10.

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through the same. Plaintiffs conveyed to the railroad a right of way over the land, and the damage is claimed to have been done to the remainder. The defendants filed a joint answer, denying that any damage had been done to the land. No separate defense was made by the railway company on the ground that the alleged damage was done by an independent contractor.

The case was submitted to the court sitting as a jury. No declarations of law were asked or given, and the court found for the plaintiffs, assessing damages at \$85. Judgment was rendered accordingly against all of the defendants, and they appealed to this court. We think there was evidence sufficient to sustain the finding of the court. The relations between the railway company and the contractors were not drawn out in the evidence, but it is shown that the damage was inflicted by those engaged in the construction of the railroad for the company, and it devolved upon the latter to show that the same was done by an independent contractor, for whose conduct the company was not responsible.

Affirmed.

LILES v. FOSBURGH LUMBER CO.

(Supreme Court of North Carolina, Sept. 11, 1906.)

[54 S. E. Rep. 795.]

Appeal—Exceptions—Waiver.—Where exceptions to the admission of evidence are not noted or urged in appellant's brief, they will be treated as abandoned, as provided by Supreme Court Rule 34 (140 N. C. 666, 43 S. E. v).

Master and Servant—Injuries to Servant—Defective Machinery—Statutes.*—Revisal 1905, § 2646, providing that any servant or employee of any railroad company who shall suffer injury to his person by reason of any defects in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against the company, etc., is applicable to a corporation operating railroads for the transportation of logs.

Same—Proximate Cause.†—Where a defect in the coupling of a flat car loaded with logs caused it to come unusually close to another car, to which it was to be coupled, before striking, and plaintiff was

*For the authorities in this series on the subject of the applicability of employer's liability acts, see foot-notes appended to *Cahill v. Boston & M. R. R.* (Mass.), 18 R. R. R. 830, 41 Am. & Eng. R. Cas., 830.

For the authorities in this series on the subject of logging railroads, see foot-notes appended to *Kent Lumber & Brick Co. v. Tax Assessor* (La.), 18 R. R. R. 446, 41 Am. & Eng. R. Cas., N. S., 446; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. Cas., N. S., 232; *McKirvergan v. Alexander & Edgar Lumber Co.* (Wis.), 15 R. R. R. 372, 38 Am. & Eng. R. Cas., N. S., 372.

†For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Central of Georgia Ry. Co. v. Duggan* (Ga.), 19 R. R. R. 803, 42 Am.

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crushed, while attempting to make the coupling under the express orders of his superintendent, the use of the defective coupling in connection with the superintendent's order constituted continuing negligence, which was the proximate cause of the injury.

Same—Instructions—Contributory Negligence.†—The court charged that if, when plaintiff attempted to couple the cars in question and was injured, great danger in doing so was manifest to him, he would be guilty of contributory negligence, though he was told to make the coupling by defendant's superintendent, but that if he reasonably believed there was no danger, and did only what a prudent man would have done under similar circumstances, then he was not guilty of contributory negligence. Held, that such instruction contained no error of which defendant could complain.

Same—Question for Jury.—In an action for injuries to a railroad employee while attempting to couple certain cars, evidence as to whether he had been ordered by his superintendent not to couple cars held for the jury.

Same—Instructions—Duty to Obey.†—That plaintiff had been generally instructed by an assistant to defendant's general superintendent not to couple cars did not relieve plaintiff of the duty of obeying an express order given by the superintendent to couple certain cars at the time of his injury.

Same—Instructions.—Plaintiff was injured while attempting to couple certain cars under the directions of his general superintendent. The court, in one part of its charge, stated that if plaintiff went between the cars without being ordered to do so, and of his own volition, the jury should answer the first issue as to defendant's negligence in the negative and also charged that if plaintiff undertook to couple the cars because he was so ordered by his superintendent, and was injured as alleged, he was "entitled to recover," and the jury should answer the first issue "Yes." Held, that the words "he is entitled to recover," construed in connection with the rest of the instruction, did not constitute reversible error.

Same—Misleading Instructions.—Where, in an action for injuries

& Eng. R. Cas., N. S., 803; foot-notes appended to Little Rock Traction & Elec. Co. v. McCaskill (Ark.), 19 R. R. R. 513, 42 Am. & Eng. R. Cas., N. S., 513; foot-notes appended to Warren v. City Elec. Ry. Co. (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; Byrd v. Southern Express Co. (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., 150; Wise Terminal Co. v. McCormick (Va.), 19 R. R. R. 23, 42 Am. & Eng. R. Cas., N. S., 23; Louisville & N. R. Co. v. Mounce (Ky.), 19 R. R. R. 1, 42 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to Ryan v. St. Louis Transit Co. (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; Chicago City Ry. Co. v. Shaw (Ill.), 18 R. R. R. 586, 41 Am. & Eng. R. Cas., N. S., 586; Brammer v. Norfolk & W. Ry. Co. (Va.), 18 R. R. R. 497, 41 Am. Eng. R. Cas., N. S., 497.

†For the authorities in this series on the subject of contributory negligence in doing dangerous work in obedience to orders, see foot-notes appended to Edgar v. New York, etc., R. Co. (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to Illinois Cent. R. Co. v. Keebler (Ky.), 18 R. R. R. 32, 41 Am. & Eng. R. Cas., N. S., 32; Kansas City, etc., R. Co. v. Thornhill (Ala.), 14 R. R. R. 851, 37 Am. & Eng. R. Cas., N. S., 851.

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to a servant, the court fully stated the contentions of the parties and the essential elements as to the issue of defendant's negligence, an instruction that if the jury found that plaintiff's superintendent told him to go between the cars and make the coupling, the jury should then consider the second issue, whether plaintiff was guilty of contributory negligence, to wit, whether plaintiff's negligence was the proximate cause of his injury, was not objectionable as misleading the jury to believe that defendant's liability depended entirely on whether the superintendent ordered plaintiff to make the coupling regardless of all other questions.

Trial—Instructions—Necessity of Requests.—Where evidence is admitted solely in corroboration of other evidence and is so limited when admitted, the failure of the judge in his charge to again instruct the jury on the nature of such evidence is not error, unless his attention is called thereto by a request for instructions.

Appeal from Superior Court, Halifax County; Webb, Judge.

Action by J. H. Liles against the Fosburgh Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for the recovery of damages for personal injuries sustained by plaintiff while in the defendant's employment. It is admitted that defendant corporation was, at the time of the accident, "operating its railroad in carrying logs for mill purposes." Plaintiff testified that he was employed by defendant to oil cars, number cars, and change switches; that he was working under the direction of Mr. Ferrall, who was general superintendent, employed plaintiff, managed and directed all the work. At the time of the injury plaintiff had been in defendant's employment 12 or 14 days, was inexperienced in railroad work. Log train No. 1 was coming in, plaintiff had been oiling the car; Ferrall told him to put the load on the side track—there were three other loaded cars there. When the train came in plaintiff changed the switch and started back; Ferrall said that there was no pin in that car, to get one out of the rear car and put it in there. As he was trying to do so he got mashed. Ferrall told plaintiff to get the pin out of the rear car and come and put it in the one which was backing up; that he tried to do so but was hurt before he could put it in. Was in the act of putting it in, the car was moving back, the logs extended beyond the end of the car. The brace that held up the drawheads was broken, and one was dropped down, leaving it so that the other drawhead would pass until it struck the pin. They lapped so that one would run into and strike the pin and that caused the cars to come together. The logs were not loaded even; some extended further over end of car than others—"two feet or something like that." Plaintiff did not notice whether they were properly loaded until after he was injured. He says: "The time the car was up there, it was so soon on me that I did not have time to get out. I attempted to get back but did not have time to do so before it was on me. I saw that the coupling was broken after

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I got in, but too late for me to get out. I do not know whether Mr. Ferrall knew of the condition of the coupling before the injury. He was present when I went in, looking at me, told me to get a pin and make the coupling. They were flat cars. Mr. Ferrall never said anything to me about coupling cars until the day I was hurt. I was hurt because the drawhead, being dropped down, let it come about two inches further than it would [otherwise] have done." Plaintiff was asked: "If you had looked at these logs as they were loaded when you first went to the car to couple it, could not you have told that they were improperly loaded?" "I did not notice particularly." "I asked if you had looked?" "If I had looked I reckon I could have seen it." "If you had looked at the logs you could have told that they were improperly loaded?" "If I had any experience. I could not have told because I did not have any experience in coupling." There was evidence on behalf of defendant contradicting plaintiff's statement that he was ordered by Mr. Ferrall to make the coupling. There was evidence that plaintiff made statements both corroborating and contradicting his testimony. No exceptions appear in the record in regard to the testimony respecting the extent of the injury or measure of damages. The defendant submitted a number of prayers for special instructions. The exceptions to the ruling of the court are set out in the opinion. There was judgment for the plaintiff, upon the verdict, to which defendant excepted and appealed.

Day & Bell, Murray Allen, and B. G. Green, for appellant.

S. G. Daniel, E. L. Travis, J. H. Kerr, and Claude Kitchin, for appellee.

CONNOR, J. (after stating the case.) While defendant noted several exceptions to rulings of his honor upon the admission of testimony, they are not noted or urged in the brief and, under the rule of this court, are treated as abandoned. Rule 34 (140 N. C. 666, 43 S. E. v. The first exception insisted upon is pointed to the refusal of the court to charge the jury that, upon all of the evidence, the plaintiff is not entitled to recover. This instruction assumes that the jury should find that the transaction occurred in the manner testified to by plaintiff. Defendant contends that the testimony construed in the light most favorable to plaintiff shows, as matter of law, contributory negligence. The defendant overlooks the decision of the court at the last term in *Hemphill v. Lumber Co.*, 141 N. C. — 54 S. E. 420, in which it is held that the provisions of Revisal of 1905, § 2646 apply to corporations operating railroads for the purpose of moving logs. The relative rights and liabilities of the parties to this action are governed by the statute, as construed by the court, in a line of cases beginning with *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734. In *Elmore v. Railroad*, 132 N. C. 865, 44 S. E. 620, the question was considered and, following *Mason v. Railroad*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814, it was

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said that when an employee, acting under the order of the conductor was injured in coupling defective cars of which he had no notice until it was too late to escape, it was error to withdraw the case from the jury. There was evidence on the part of plaintiff that the coupling was defective and that such defect was the proximate cause of the injury; that he was ordered by the general superintendent to make the coupling. The defendant's contention that failing to examine the coupler and ascertain its defective condition before obeying the order was not only negligence but, as matter of law, or legal inference, the proximate cause of the injury, cannot be sustained. If it had appeared that he knew of such defect and that the chances of being injured in obeying the order were greater than in doing so safely and that, with such knowledge, he took the chances, under the ruling of this court in Elmore's Case *supra*, he could not recover. The use of a defective coupler was a violation of a positive duty, a constant menace to employees, and in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the causa causans of the injury. The principle upon which Greenlee's Case and a number of others are based has been repeatedly announced and uniformly applied by this court. His honor correctly declined to give the instruction requested. In this connection he charged the jury: "It was the duty of the plaintiff to have acted as a prudent man would have acted under similar circumstances, taking into consideration all the conditions and circumstances at the time. If, at the time the plaintiff attempted to couple the cars and was injured, great danger in doing so was manifest to him, but, notwithstanding such manifest danger, he did attempt to couple the cars and in doing so was injured, then the court charges you he was guilty of contributory negligence, notwithstanding you may find that he was told to do so by the witness Ferrall, the defendant's agent and manager. If you find that, at the time the plaintiff went in between the cars to make the coupling, or attempted to make it, he reasonably believed that there was no danger in doing so, and did only what a prudent man would have done under similar circumstances if he was coupling cars, then the court charges you that he was not guilty of contributory negligence, and you should answer the second issue, 'No'—that is, the issue of contributory negligence—provided you find, from the greater weight of the evidence, that he was ordered to make the coupling by the defendant." There was no error in this instruction of which the defendant can complain. We adhere to the conclusion reached by us in Hemphill's Case, *supra*, that roads operated for hauling logs come within the beneficent provisions of Revisal of 1905, § 2646. The statute is remedial, being for the protection of employees on railroads from injury by reason of defective machinery, ways, or appliances. We think that the evils intended to be remedied, and the protection extended, as well as the language of the statute, include all corporations owning or operating railroads. The question is so fully

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discussed and the authorities cited by Clark, C. J. in Hemphill's Case, *supra*, that it is unnecessary to do more than refer to the opinion therein.

For the same reason the defendant's eighth exception cannot be sustained.

The twelfth exception is directed to the following instruction given to the jury: "That if the jury shall find from the evidence that the defendant's car was equipped with a broken drawhead, so that the drawheads of the two cars passed each other instead of meeting when they were brought together for coupling, and permitted the cars to come so close together as to crush a person coupling them, that would be negligence; and if they find from the evidence that the defendant so loaded its logs on said cars that the ends projected so far over the ends of the cars that when they were brought together to be coupled the ends of the logs on the two meeting cars came so close together as to crush a person coupling the cars, that would be negligence, provided these defects were known to the defendant or could have been known by reasonable care and diligence. If you find from the evidence that plaintiff, in obedience to the order of Ferrall, the superintendent of the defendant company, undertook to couple said cars, and on account of the broken condition of the drawhead and the negligent manner in which the logs were loaded, was caught and crushed between them and injured, you will answer the first issue, 'Yes.' " Defendant says that there is no evidence that the defect in the drawhead alone would have caused the injury. Plaintiff said: "I was hurt because the drawhead, being dropped down, let it come two inches further than it would have done." The plaintiff simply meant to say, as we construe his testimony, that the extension of the logs would not have injured him if the coupler had not been broken as described by him. This is perfectly consistent with the conditions as he described them. Two negligent acts may so operate as to become jointly the proximate cause of the injury. Defendant says that there was evidence that plaintiff was told not to couple cars, and if the jury believe this, the plaintiff, in going between the cars to make the coupling was disobeying orders, and that, in such case, defendant owed him no duty, citing *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562. His honor clearly recognized this to be the law and made the defendant's liability depend upon whether plaintiff attempted to couple the cars in obedience to the order of the superintendent. W. T. Liles, an assistant of Ferrall, says that when he put plaintiff to work he instructed him not to couple cars. Plaintiff denies this. It therefore became a question for the jury. If Liles did, in a general instruction, tell plaintiff not to couple the cars, it would not relieve him of the duty of obeying an express order given by the general superintendent, the superior of both. In several parts of the charge, which is very full, his honor instructed the jury that they must find that plaintiff attempted to make the coupling in obedience to Ferrall's order before they could answer the first issue in the

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affirmative. At one time his honor says, "Did the plaintiff go in there without being ordered by Ferrall? Did he go in there of his own volition? If he did you will answer the first issue, 'No.'" In another portion of his charge after presenting certain phases of the case to which there is no objection, he concluded: "If plaintiff undertook to couple said cars because he was so ordered by said superintendent and was injured as alleged he is entitled to recover, and you will answer the first issue, 'Yes.'" Defendant excepted to the words "he is entitled to recover." It is too well settled to require or justify the citation of authority that, in construing an instruction given by the trial judge, the entire charge will be examined and language excepted to read in connection with the context. If we were required to disassociate the language excepted to, we would be compelled to sustain the exception. It is elementary that such an instruction, standing alone, would be error, but it would do violence to all fair rules of construction and attribute to the jury a degree of ignorance rendering them unfit for the important duties imposed upon them by the law, to suppose that they did not understand that the judge was referring only to the first issue, as he expressly stated. In that connection and at that time no reference whatever had been made to the question of contributory negligence. While we do not commend the use of the expression we cannot find in it, as used by his honor, reversible error. After stating an hypothesis which, if found to be true, his honor told the jury they should answer the first issue in the negative, he said: "But if you find from the greater weight of the evidence that Ferrell told this man to go in and make this coupling, why then you will consider the second issue, 'was the plaintiff guilty of contributory negligence.' That means, gentlemen, was his negligence the proximate cause of his injury?" To this language defendant excepts. The criticism that the language makes the defendant's liability depend entirely upon the question whether defendant's superintendent ordered the plaintiff to make the coupling, regardless of all other questions is untenable. Very much testimony had been introduced tending to, and, if believed, clearly contradicting plaintiff in that respect. Ferrall denied that he had given such order. Several witnesses had sworn that plaintiff had made contradictory statements. Dr. Picot and others had testified to corroboratory statements. It is evident that, upon the first issue, his question was the principal fact in controversy. Before using the language excepted to, his honor had fully stated the contentions of the parties and the essential elements upon the existence of which the answer to the first issue depended. His honor again stated the basis of plaintiff's claim in language to which there was an exception which was abandoned in this court. We cannot think that the jury could have misunderstood his honor or been misled by his language. The exception does not present the question decided in *Tillett v. Railroad*, 116 N. C. 937, 21 S. E. 698; *Williams v. Haid*, 118 N. C. 481, 24 S. E. 217. In those cases separate and distinct propositions of law, one of

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which was erroneous, were laid down by the court. Plaintiff introduced Dr. Picot to prove declarations made by him after the injury, in regard to the manner in which it occurred. He also introduced his father and another witness who were present and heard other declarations. At the time all of this class of testimony was admitted his honor stated that it was competent only for the purpose of corroboration. When he charged the jury, reciting Dr. Picot's testimony, he repeated that it was to be considered only for that purpose, but failed to do so in reciting the testimony of the other witnesses. The exception is disposed of by rule 27 (140 N. C. 662, 46 S. E. v.): "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instructions." Defendant suggests that after stating to the jury that Dr. Picot's evidence was to be considered only as corroborative, and failing to repeat the same in connection with the testimony of the other witnesses, was calculated to impress the jury with the belief that they could consider such testimony as substantive evidence. We cannot think so. If such impression was made on the mind of the counsel at the time, he should have requested the court to say to the jury that the same rule applied to all of the testimony of that class. We do not doubt that his honor would have promptly done so. The exception cannot be sustained. The record contains a number of exceptions to his honor's charge, all of which, except those discussed herein, were abandoned.

We have examined the entire charge and find no error of which defendant can complain. As his honor repeatedly told the jury, the principal controversy in respect to the facts was whether the plaintiff was ordered by the defendant's superintendent to make the coupling, that question was fairly submitted, and, upon the instructions given the jury, they found for the plaintiff.

No error.

MCDONNELL *v.* NEW YORK, N. H. & H. R. R.

(Supreme Judicial Court of Massachusetts, Suffolk, Sept. 5, 1906.)

[78 N. E. Rep. 548.]

Master and Servant—Injuries to Servant—Appliances—Negligence.—Plaintiff, a railroad fireman, was injured by the slipping of a ladder which he was using for the purpose of climbing to the top of one of defendant's engines at the direction of the engineer. Plaintiff claimed that the ladder was defective in that it was fitted with a V-shaped iron at the bottom, but there was nothing to show that such iron was not a usual and proper mode of construction, or that the ladder was thus made unsafe in the hands of a person exercising ordinary care, though it was shown that the ladder slipped and had done so once before. Held, that such facts were insufficient to establish negligence on the part of the railroad company in furnishing plaintiff with an unsafe appliance.

Same—Care Required.*—A railroad company is not bound as a matter of law to furnish a stationary ladder or one with hooks for the use of a fireman in climbing to the top of one of its engines, but was only bound to exercise reasonable care to see that the ladders furnished were safe and proper for the use for which they were intended.

Same—Acts of Superintendent.—The act of an engineer in placing a ladder against the boiler of an engine before directing plaintiff, a fireman, to ascend the same to shut off the steam, was a mere act of assistance, and not an act of superintendence, relieving plaintiff from inspecting the security of the ladder before attempting to ascend it.

Same.†—Where a railroad engineer placed a ladder against the boiler of an engine and directed plaintiff, a fireman, to "go up there and shut off the steam," such statement did not relieve plaintiff, from the duty of exercising care for his own safety in determining whether the ladder was safely placed before attempting to ascend it.

Exceptions from Superior Court, Suffolk County; L. Le B. Holmes, Judge.

Action by one McDonnell against the New York, New Ha-

*For the authorities in this series on the subject of the care required of a railroad company, as an employer, in furnishing and maintaining appliances, see foot-notes appended to Langhorn, Johnson & Co. *v.* Wiley (Ky.), 19 R. R. R. 707, 42 Am. & Eng. R. Cas., N. S., 707; foot-notes appended to Mayer *v.* Detroit, etc., Ry. Co. (Mich.), 19 R. R. R. 267, 42 Am. & Eng. R. Cas., N. S., 267; Wood *v.* Southern Ry. Co. (Va.), 19 R. R. R. 19, 42 Am. & Eng. R. Cas., N. S., 19.

†For the authorities in this series on the subject of the care required of a railroad employee for his own safety as affected by the fact that he is attempting to do dangerous work in obedience to a direct order, see foot-notes appended to Edgar *v.* New York, etc., R. Co. (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to Illinois Cent. R. Co. *v.* Keebler (Ky.), 18 R. R. R. 32, 41 Am. & Eng. R. Cas., N. S., 32; foot-notes appended to Kansas City, etc., R. Co. *v.* Thornhill (Ala.), 14 R. R. R. 851, 37 Am. & Eng. R. Cas., N. S., 851.

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ven & Hartford Railroad. A verdict was directed for defendant, and plaintiff brings exceptions. Overruled.

Tort for personal injuries to plaintiff, a fireman in the employ of defendant, who was injured by the fall of a ladder, which he alleged he was ordered to use by one Dutton, who it was also alleged was a superintendent in defendant's employ.

James E. Cotter, Conrad Reno, and Jos. P. Fagan, for plaintiff.

Choate, Hall & Stewart and Joseph Wentworth, for defendant.

MORTON, J. We assume in favor of the plaintiff, that the ladder was a part of the ways, works and machinery of the boiler room, and also, though with much more doubt, that Dutton was a person whose sole or principal duty was that of superintendence. He had charge of the engines and as engineer had the direction and control of his assistants and of the fireman, of whom the plaintiff was one. He started and stopped the engines, saw to the cleaning of them and the filling of the oil cups and the packing of the engines and did other manual labor as required. He had no power to hire or discharge his assistants or the firemen, and it would seem that his position was that of a superior servant performing manual labor as required in the proper discharge of his duties, and exercising such direction and control over his assistants and the firemen as was necessary to secure efficient service on their part, rather than that of one whose sole or principal duty was that of superintendence. But however that may be, we think that there was no evidence of a defect in the ladder or of negligence on the part of Dutton. The only thing in respect to which it is contended that the ladder was defective is the V-shaped iron, on the bottom. There is nothing to show that this was not a usual and proper mode of construction adopted to prevent the ladder from breaking and wearing, or that the ladder as thus made was unsafe in the hands of a person exercising ordinary care. The fact that the ladder slipped, and had done so once before, was as consistent, to say the least, with a want of due care on the part of the plaintiff and the other persons using it as with a defect in the construction. The V-shaped irons would seem to have rendered the ladder more secure instead of less if the person using it exercised proper care. It cannot be said as matter of law, that the defendant was bound to furnish a stationary ladder or one with hooks upon it, and that it could be found guilty of negligence for not doing so. It was not bound to furnish the best possible appliances but only to exercise reasonable care in seeing that those which it furnished were safe and proper for the use for which they were intended. We see no evidence of negligence on its part in the performance of this duty. See *Nealand v. L. & B. R. R.*, 173 Mass. 42, 53 N. E. 137; *Regan v. Donovan*, 159 Mass. 1, 33 N. E. 702; *Wood v. Tileston Co.*, 182 Mass. 449, 65 N. E. 810.

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As to Dutton, all that he did was to place the ladder against the boiler and tell the plaintiff to go up and shut off the steam. The position in which the ladder stood was perfectly obvious to the plaintiff and he was at liberty to change it if he saw fit to. Dutton's act in placing the ladder against the boiler cannot fairly be regarded as anything more than a slight act of assistance to the plaintiff in doing that which Dutton had directed him to do. It cannot properly be regarded as an act of superintendence or as relieving the plaintiff from himself looking to the placing of the ladder before he attempted to ascend it. Nor can the direction, "Go up the ladder and shut off that steam up there, that valve," and tapping him on the shoulder and saying "Go ahead Mac" be regarded as excusing the plaintiff from such attention to his own safety. *Gouin v. Wampanoag Mills*, 172 Mass. 222, 51 N. E. 1078; *Ruchinsky v. French*, 168 Mass. 68, 46 N. E. 417.

Exceptions overruled.

GARNER et al. v. ST. LOUIS, I. M. & S. RY.

(Supreme Court of Arkansas, June 18, 1906.)

[96 S. W. Rep. 187.]

Carriers—Liability for Freight—Commencement of Risk.*—A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of the bill of lading.

Same—Evidence—Sufficiency.—In an action for the destruction of goods delivered to a carrier, evidence examined, and held to show that the property was received for immediate shipment, though the bill of lading had not been issued.

Sales—Transfer of Title—Delivery—Muniments of Title—Destruction of Goods—Seller's Rights.—The sale of cotton f. o. b. on platform, the seller not being entitled to his pay until he delivered the bill of lading to the purchaser or to a bank with draft attached, is not completed by the delivery of the cotton on the platform, so as to deprive the seller of his right of recovery for cotton burned after such delivery, but before the issuance of the bill of lading.

Appeal from Circuit Court, Johnson County; William L. Moose, Judge.

Action by R. C. Garner and another against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

The evidence, in addition to that disclosed by the opinion, is

*See foot-notes appended to *Anderson v. Mobile & O. R. Co.* (Miss.), 19 R. R. R. 382, 42 Am. & Eng. R. Cas., N. S., 382; *Chicago, etc., R. Co. v. Powers* (Neb.), 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286.

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as follows: J. W. Robinson testified that he was night watchman on defendant's platform and frequently assisted defendant's agent in making out bills of lading, having previously done so for plaintiffs; that he received from plaintiffs instructions to ship their cotton to the cotton company, which was hung on a hook in the depot office; that at plaintiffs' request he engaged Fred Mohon to put the cotton on the platform; that he informed the agent of the shipping instructions, pointing it out to him, who said something as to checking. Fred Mohon testified that at the instance of Robinson he put plaintiffs cotton on the platform and informed the agent thereof, and that the agent checked such cotton and issued a bill of lading for certain other cotton. J. S. Garner, one of the plaintiffs, testified he mailed a list of the cotton to Robinson as he had before done, the custom being for Robinson to put the cotton on the platform and get the bill of lading. The cotton was sold f. o. b. platform, plaintiffs to put the cotton on platform, get a bill of lading, afterwards issuing draft and attaching it to such bill; that he understood the delivery to a railway company to be complete when the cotton was placed on the platform with shipping instructions, but that as to the purchaser plaintiffs were to get a bill of lading for the cotton; that he understood Mr. Robinson was not acting agent of the railroad; and that he was not, to his knowledge, employed to do anything except watch, though he did a good deal of the agent's work.

Cravens & Covington, for appellants.

HILL, C. J. (after stating the facts). The Garners were merchants at Lamar and contracted to sell Lesser Cotton Company 100 bales of cotton at 7½ cents f. o. b. the railroad platform. When delivered to the railroad a bill of lading was issued, and Garner would attach it to a draft drawn on Lesser Cotton Company and collect the draft at his bank. The details of the sale are not otherwise important. The Garners had 8 bales of cotton at Knoxville and directed it shipped. It was delivered upon the railway platform, the numbers checked by the agent preparatory to issuing a bill of lading, and shipping instructions were delivered to the agent. The night of the day when the cotton was put on the platform the station burned, and this cotton was destroyed. The Garners sued the railroad company for its value, and the court directed a verdict for the railroad company, and the Garners have appealed. The reporter will set forth a summary of the evidence in the statement of facts.

A carrier's liability begins when it receives freight for immediate shipment, and is not dependent upon the issuance of a bill of lading. *Railway v. Neel*, 56 Ark. 279, 19 S. W. 963; *Railway v. Murphy*, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; *Railway v. Hunter*, 42 Ark. 200. There was ample evidence to go to the jury on the contention that the cotton was received for immediate shipment, although a bill of lading had not been issued. Appellee's counsel has not favored the court

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with a brief, but appellant's counsel states that his theory was that from the evidence of J. S. Garner it was shown that the cotton belonged to Lesser Cotton Company and not to the Garners. This was evidently the theory upon which the verdict was directed. A bill of lading represents the property. It is a muniment of title, and is both a receipt and contract. *Turner v. Israel*, 64 Ark. 244, 41 S. W. 806; *Ray on Negligence of Imposed Duties of Freight Carriers*, § 25. When such instruments are attached to drafts, then the title to the property passes with the draft, and the pledgee or purchaser of the draft has a special ownership in the goods, which he may assert against every one. *Id.* § 31.

But this principle cannot control here. The testimony of Garner shows that he was not entitled to receive anything on the cotton under this contract with Lesser Cotton Company until he received his bill of lading. Then he was entitled to draw for the money. In this way Lesser Cotton Company was protected, for it could hold the cotton against the world upon such an instrument. It would pay the draft, or a bank would cash it in reliance upon such payment, only when the bill of lading was attached thereto, conveying the title. Until the Garners furnished Lesser Cotton Company with the muniment of title, they were not entitled to receive a cent on the cotton under the contract. This cotton was being prepared to follow a course of affairs when the title would pass to the cotton company. The first step was delivery to the carrier, the next securing a muniment of title, and finally to deliver that muniment either directly to the Lesser Cotton Company or to a bank with draft attached, when in due commercial course it would reach the cotton company. In his case, only the first step had been taken; the delivery to the railroad company. None of the other necessary acts to change the title to Lesser Cotton Company had been performed.

Appellant's counsel say that appellee relied upon "opinions of this court in certain liquor cases in support of his contention." Doubtless reference is made to *State v. Carl & Tobey*, 43 Ark. 353, 51 Am. Rep. 565, and cases following it, where it was held delivery to the carrier completed the contract. *Burton v. Baird*, 44 Ark. 556, is another instance where delivery to the carrier in pursuance of directions from the other party completed the contract. But those cases do not reach to this one. Here the mere delivery to the carrier with shipping directions was not the termination of Garner's conduct to complete his sale. He had to get a bill of lading and attach it to a draft before he was entitled to a cent, and hence his sale was not complete when he delivered the cotton to the carrier. This was not the final act in consummation of his contract. This was Garner's evidence. It was reasonable and consistent with a common business practice, and if given credit the cotton was appellants' at the time of the fire. The case should have gone to the jury.

Judgment reversed, and cause remanded.

SAWYER *v.* NORFOLK & S. R. Co.

(Supreme Court of North Carolina, Sept. 11, 1906.)

[54 S. E. Rep. 793.]

Corporations—Liability for Slander.—A corporation may be liable for slander committed by its agent or employee.

Same—Scope of Authority of Agent or Employee.*—Where plaintiff, desiring employment with defendant railroad company to look after trucking, went of his own accord to defendant's superintendent, who had charge of employing persons for such work, and the superintendent, in addition to stating that he did not want him, slandered him in regard to his former work for the company, defendant is not liable for the slander; there having been no such relation between them that defendant owed plaintiff any special duty, and slandering plaintiff not being within the implied authority of the superintendent.

Appeal from Superior Court, Camden County; Neal, Judge.

Action by A. Sawyer against the Norfolk & Southern Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

This was a civil action tried before Neal, Judge, at the superior court of Camden county, March term, 1906. The pleadings show the contentions of the parties.

Plaintiff testified in his own behalf, as follows:

"I reside in this county near Sawyer's Creek. Lived in this

*For the authorities in this series on the question whether the master's liability for the negligent acts or torts of his servant depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-notes appended to *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683; foot-notes appended to *Palos Coal & Coke Co. v. Benson* (Ala.), 19 R. R. R. 185, 42 Am. & Eng. R. Cas., N. S., 185.

For the authorities in this series on the question, what acts are, and are not, within the scope of employment of a railroad employee, see *Palos Coal & Coke Co. v. Benson* (Ala.), 19 R. R. R. 185, 42 Am. & Eng. R. Cas., N. S., 185 (mining company was not liable for an assault by its general superintendent on a driver of one of its cars while the superintendent was riding on it, in absence of evidence that the assault was committed in pursuance of his duties); *McTaggart v. Maine Cent. R. Co.* (Me.), 19 R. R. R. 240, 42 Am. & Eng. R. Cas., N. S., 240 (baggage man was acting outside of the scope of his duties in attempting to throw off telegraph message from a car at the request of a station agent); *Chicago, etc., Ry. Co. v. Kerr* (Neb.), 19 R. R. R. 369, 42 Am. & Eng. R. Cas., N. S., 368; *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683 (where a boy who had been stealing a ride on a freight train jumped from the train and was pursued by a detective employed to keep tramps and trespassers from its trains and yards, and, at a point about 100 feet from the yard, was shot by the detective, it was held that it was a question for the jury whether the detective acted within the scope of his employment, or whether he acted as a public officer only); *Milton v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 653, 41 Am. &

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county all my life and am 42 years of age, have been engaged in various pursuits, mostly merchandising, farming, selling guano, and attending to shipping truck at Belcross. Before April, 1904, I had been working for defendant, helping to load truck for two or three years or more. Defendant company had side track at Belcross and I looked after truck, seeing that they were properly loaded and that each package was placed in the proper car, and properly billed. I was employed by W. W. King, Supt. of N. and S., deft. R. R., and received compensation for my services. My work commenced in May, and ended with the trucking season, about August, so I was engaged throughout the trucking season. Up to 1904, there had been no complaint about my work. In this month I went to Norfolk, and went in to see W. W. King in his office. His office was in the general office of the defendant company. The general office is a large building 60x100 feet on the second floor. There was a large room cut up into different sections by railings from three to four feet high and W. W. King's section was to the left as you enter. While in his room I could see many people at work in the several sections, some 20 or 30 were in sight of me, and 5 or 6 near enough to hear what was said, these within 8 or 10 feet of me. I went in Mr. King's office to see him on business, viz. to see if the company wanted to employ me to attend to the loading and shipping of the truck at Belcross station during the trucking season as they had done in the previous years. I asked him when he came in, if

Eng. R. Cas., N. S., 653 (an arrest was not within the scope of employment of a servant of a detective agency, which the railroad had directed to find out who had committed a certain robbery, so as to render the railroad liable for false imprisonment); *Edgar v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403 (superintendent was acting within scope of his employment in ordering freight brakeman to couple air hose between cars, and in assuring him that he would "lookout" for him); *Drolshagan v. Union Depot R. Co.* (Mo.), 18 R. R. R. 223, 41 Am. & Eng. R. Cas., N. S., 223 (motorman was not acting within scope of his employment in ejecting a boy who was trying to ride on running board of street car); *St. Louis, etc., Ry. Co. v. Grant* (Ark.), 17 R. R. R. 343, 40 Am. & Eng. R. Cas., N. S., 343 (defendant's detective was acting within the scope of his employment in assaulting a person engaged in taking down car numbers); *Barmore v. Vicksburg, S. & P. Ry. Co.* (Miss.), 17 R. R. R. 841, 40 Am. & Eng. R. Cas., N. S., 841 (servant entrusted with dangerous appliances causing injury to stranger, master not allowed to escape responsibility on the ground that the servant, in the act complained of, was acting outside scope of his employment); *Chicago Terminal Transfer R. Co. v. Schiavone* (Ill.), 17 R. R. R. 339, 40 Am. & Eng. R. Cas., N. S., 339 (necessity of evidence showing that conductor was acting within scope of his employment in allowing certain other employees to ride to work); *Texas Midland R. R. v. Dean* (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596 (arrest of passenger, carrier liable for act of baggage master in assisting officer, although latter was not at the time actively doing anything in furtherance of carrier's business); *Bowen v. Illinois Cent. R. Co.* (C. C. A.), 16 R. R. R. 269, 39 Am. & Eng. R. Cas., N. S., 269 (where one, who was defendant's station agent and also acted as express company's agent, killed a person while he was signing a receipt book for a package, it could not be assumed that the package contained freight matter, and not express matter); *Willis v. Maysville*

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he wanted to employ me to attend to the loading and shipping of truck at Belcross as he had done heretofore. He said, 'No; I don't want any such man as you are.' That I had robbed the company, and was doing so every chance I got, and as to the shortage on potatoes you claim, they were never grown, marked, loaded, or put in the cars. If they had been, they would have been in there when the car got to New York. I do not intend to pay for them, and as to the stock that has been killed by the company, I have paid for them all. I then told him that I had not received the pay; if he had paid it, that it must be in the hands of some employee or in his possession. I had never received it. He spoke the whole conversation in such an abrupt and insulting manner that, of course, I was mad. I then went out of the office into the office of the auditor, Mr. Glazier, which was the adjoining section. I had not at that time been paid for the stock. I had not worked for them nor had any connection with them since August, 1903, the close of the trucking season. Mr. W. W. King was the superintendent in charge of that work; shipping truck. I had never robbed the company in any way. I looked after the whole of the shipping at Belcross on the side track at my farm. I saw the truck was properly loaded, marked, and counted, and reported to the agent for billing purposes. Each piece was properly counted, loaded, and reported to the agent of the defendant company. There had been some shortage in a shipment of potatoes made by my uncle, A. Sawyer. These

& B. S. R. Co. (Ky.), 16 R. R. R. 832, 39 Am. & Eng. R. Cas., N. S., 832 (where boy was injured by ice kicked by brakeman from passing train, the question whether the brakeman was acting within scope of his authority was for the jury); *Deck v. Baltimore & O. R. Co.* (Md.), 15 R. R. R. 340, 38 Am. & Eng. R. Cas., N. S., 340 (shooting of trespasser by servant after ejection, question for jury whether servant acted as officer of the state, or within scope of his employment by defendant); *Daniel v. Atlantic Coast Line R. Co.* (N. Car.), 14 R. R. R. 334, 37 Am. & Eng. R. Cas., N. S., 334 (cashier in local office of a railroad, whose duties are to collect money for freight, and sell tickets to passengers, and forward the money to the railroad's treasurer, is without authority to cause the arrest of one whom he suspects of having stolen money from the office); *Waalder v. Great Northern Ry. Co.* (S. Dak.), 14 R. R. R. 819, 37 Am. & Eng. R. Cas., N. S., 819 (assault upon servant of owner of land, upon which the railroad was building a snow fence without authority, was not within scope of authority of railroad employees directed to build fence); *Higby v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 479, 36 Am. & Eng. R. Cas., N. S., 479 (special police officer in the service of a railroad company acted within his statutory authority when he arrested a person who had jumped off a car on which he had been a trespasser and was in the act of escaping); *Morgan v. Rockland, etc., Ry. Co.* (Me.), 12 R. R. R. 721, 35 Am. & Eng. R. Cas., N. S., 721 (injury to employee resulted from negligence of servant acting outside scope of employment); *Polatty v. Charleston & W. C. Ry.* (S. Car.), 10 R. R. R. 16, 33 Am. & Eng. R. Cas., N. S., 16 (scope of employment of engineer assaulting trespasser on train was a question for jury); *Euting v. Chicago & N. W. Ry. Co.* (Wis.), 5 R. R. R. 513, 28 Am. & Eng. R. Cas., N. S., 513 (scope of engineer's employment where a child was injured by torpedo, placed upon track for former's amusement); *Texas & P. Ry. Co. v. Parker* (Tex. Civ. App.), 3 R. R. R. 906, 26 Am. & Eng. R. Cas., N. S., 906 (where an employee of a

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potatoes were shipped and loaded on the defendant's cars. Mr. Godfrey, my man, saw them loaded. Mr. W. W. King spoke very loudly, like folks will when they are mad. It attracted the attention of several in the room and they looked towards me when he charged me with robbing the company. I had no friend with me, and was all alone. I was humiliated, and it affected me very seriously. The people in the office gazed at me, and there were several ladies in there. The defendant is worth, I suppose, \$2,000,000. Its road starts at Norfolk, and runs through various counties to Washington, N. C. It has steamboats and ferry connections. I had written to Supt. King that I was coming to see him at that time, and I went at the time stated and he said that he expected me. I cannot measure my damage in dollars and cents. My pride was hurt pretty badly. It is terrible for a man to be charged with robbery."

Upon cross-examination witness says:

"I commenced to merchandise in 1888 in copartnership with Mr. Berry. My first year's business was \$5,000 and it is about the same now. The mercantile business has fallen off. Mr. W. W. King is now dead. He died the same year this talk took place. He looked very healthy, but some time after that had a serious attack of heart failure. He spoke the words in a very abrupt and insulting manner. I had seen him before this. There had been a few hitches, but no particular trouble except the friction about the killing of the stock referred to above, and up to

railroad company found plaintiff asleep in a car, and locked him in, and sent for the sheriff; and, in an action against the company, the station agent testified that its property and cars were in his charge, and that it was his duty to protect them from trespassers, and that he told the employees under him to lock the door on any one found in empty cars, it was held that the employee's act was within the scope of his authority); note appended to *Missouri, etc., Ry. Co. v. Edwards* (Tex.), 2 R. R. R. 430, 25 Am. & Eng. R. Cas., N. S., 430; *McFarland v. Pennsylvania R. Co.* (Pa.), 22 Am. & Eng. R. Cas., N. S., 16 (testimony that, as an intending passenger was in the act of entering a car, the conductor caught hold of him, saying, "stay off till the people get out," was evidence that what the conductor did was in the course of his employment); *Turley v. Boston & M. R. R.* (N. H.), 20 Am. & Eng. R. Cas., N. S., 440 (plaintiff testified that he went to defendant's freight yard to look for coal cars, intending to apply for a job of shoveling, and was shot by defendant's servant while running away after the latter had attempted to seize him as a trespasser; but there was no evidence that the shooting resulted from defendant's fault, or was directed by it or done by its authority, or that the act complained of was any part of the work of the servant, who was employed to clean and care for the lamps in the yard, which was the sole capacity in which he represented defendant. It was held that the servant's act was not within the scope of his employment); *Griven v. New York Cent., etc.*, (N. Y.), 20 Am. Eng. R. Cas., N. S., 547 (the evidence showed that plaintiff was stealing a ride on defendant's freight train; that he was pursued on the train by a brakeman, and, jumping therefrom, was followed by the brakeman, who jumped from the car on top of him breaking his leg. It was held that the question whether the assault by the brakeman was commenced before he left the car, and was therefore in the line of his employment, was for the jury); *Elliott v. Louisville & N. R. Co.* (Ky.), 15 Am. & Eng. R. Cas., N. S., 805 (where the acts of a brake-

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that time, very little about this. He appeared to be very angry at the time. I had never examined the records to see if there is a \$1,900,000 mortgage on the railroad property."

On redirect examination witness stated:

"I do not know how Mr. King's health was when this suit was brought in May, 1904, but he stayed with debt. until his death. T. B. Godfrey, witness for plaintiff, testified as follows: I remember the shipping of the Alfred Sawyer Sr. potatoes from Belcross, I was working for the defendant. The potatoes were shipped by the plaintiff, and I put them in the cars, marked and counted them. They were shipped in Alfred Sawyer Sr.'s name, and were properly billed and put in the cars."

Plaintiff rested.

The defendant moved for judgment of nonsuit, the motion was allowed, and the plaintiff appealed.

Aydlett & Ehringhaus, for appellant.

Purden & Purden and *Shepherd & Shepherd*, for appellee.

HOKE, J. There is some authority for the position that cor-

man in frightening a trespasser from a car of a work train by violence, and in seizing and pushing him under the car, so that his feet are crushed by its wheels, all occur within a few seconds, such acts constitute one transaction, for which the railroad is liable, the ejection of the trespasser being one of the brakeman's duties); *Schimpf v. Harris* (Pa.), 11 Am. & Eng. R. Cas., N. S., 470 (whether brakeman, when off duty and on his way to collect tickets, in the absence of the conductor, was acting in the line of his duty, was a question for the jury); *Chesapeake & O. R. Co. v. Anderson* (Va.), 9 Am. & Eng. R. Cas., N. S., 136 (authority of brakeman to expel trespassers will be inferred, if it was the custom of the brakeman to do so, and the company knew, or ought to have known, of the custom); *Pullman Palace-Car Co. v. Lawrence* (Miss.), 8 Am. & Eng. R. Cas., N. S., 59 (a reporter in the employ of a sleeping-car company, whose duty it was to attend the calls of passengers and serve them food when requested, answered a summons by a passenger for his attendance, and, upon the passenger's requesting him to procure food, became enraged and, without provocation, attacked the passenger, brutally assaulting him. It was held that, under the laws of Illinois, the porter was engaged in the company's business and was acting within the scope of his employment); *Gray v. Boston & M. R. R.* (Mass.), 8 Am. & Eng. R. Cas., N. S., 481 (where there is evidence tending to show that an employee of a railroad was employed specially for the purpose of keeping the men's waiting room and closet in a station clean and in proper condition, and that it was part of his duty to keep the room and closet clear of loafers, the jury is warranted in finding that the ejection of a drunken man from the station was within the scope of his employment); *Farber v. Missouri Pac. Ry. Co.* (Mo.), 7 Am. & Eng. R. Cas., N. S., 700 (sufficiency of evidence of brakeman's authority to eject trespassers); *Ephland v. Missouri Pac. Ry. Co.* (Mo.), 7 Am. & Eng. R. Cas., N. S., 579 (the negligence and terrifying acts and exclamations of a brakeman in the caboose of a mixed train were such as to reasonably cause a passenger in the caboose to believe that a wreck was imminent, and he jumped from the train and was injured. It appeared that the brakeman had no express duty to perform in or about the caboose, nor in the direction of the passengers, and that there was no reason for his alarm. It was held that railway was liable for the injuries).

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porations cannot in any case be held civilly liable for slander. And it has also been held and is so stated in several of the text-books that they are only so responsible when it affirmatively appears that they expressly authorized the very words which form the basis of the charge. The first position does not rest on any very satisfactory reason, and has been generally rejected; and the second we think can only be received with much qualification. It is now well established that private corporations, under certain circumstances, will be held liable for torts both negligent and malicious on the part of their servants, agents, and employees. The doctrine is stated in 1 Jaggard on Torts, p. 167, section 58, as follows: "Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That the conduct complained of necessarily involved malice, or was beyond the scope of corporate authority, constitutes no defense to their liability;" and this statement is in accord with well-considered decisions in this and other jurisdictions. *Hussy v. Railroad*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; *Jackson v. Telephone Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Railroad v. Quigley*, 62 U. S. 202, 16 L. Ed. 73; *Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Palmeri v. Railroad*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632.

According to the varying facts of different cases, the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employees of the company, and sometimes the facts present an additional element, and involve some independent duty which the corporation may owe directly to third persons, the injured or complaining party. This distinction will be found, suggested and approved in 1 Jaggard on Torts, p. 257, section 85: "Course of employment: Another conception of the master's liability rests on the proposition that in certain cases the liability arises, not from relationship of the master and servant exclusively, but also from the duty owed to plaintiff by defendant in the particular case in issue. In dealing with cases in which the question of the liability of the master for the tort of his servant is raised, reference should be had not alone to the relationship of the master and servant, but also to the relationship between the master and the third person complaining of injury. It would seem that the scope of authority test considers too exclusively the form of relationship, and overlooks the latter. In fact, one's right infringed by the wrong of another may be in personam or in the nature of the right in personam, as where a passenger complains of the torts of a carrier's servants, or a customer of the torts of a proprietor's servant." And Hale on Torts, at p. 147, gives the same distinction. It will be noted that the instances given by both of these authors, under the second class, are where the conduct complained of on the part of the employee, in the course of his employment, was in breach of some duty which the employer owed directly to the passenger in the one case and the customer in the other. They

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had been invited upon the premises and were there by invitation and under circumstances which gave them the right to considerate and courteous treatment; and in the case of the carrier, this obligation was further enforced and could be made to rest on the duty arising to the public by reason of its quasi public character, growing out of its chartered privileges, as in *Daniel's Case*, 117 N. C. 592, 23 S. E. 327.

In the case at bar, however, there is no responsibility attaching by reason of the breach of any special duty owed to the plaintiff by reason of his placing or by reason of the special circumstances of the case. The plaintiff was not a passenger, nor was he in the office by any invitation of the company, general or special. On the contrary, he had gone to the office to see King, the superintendent, of his own motion, and for his own advantage—the men were at arm's length considering a business proposition affecting the plaintiff's interest. The case, then, is one where responsibility must attach, if at all, simply and exclusively by reason of the relationship which King bore to the company and the power given him to select and employ the plaintiff as one of the company's agents. In cases of this character the responsibility of a corporation for slander or other malicious torts, by its agents and employees in the course of their employment, depends in its last analysis on whether the acts complained of were authorized or ratified by the company. The test of responsibility established by the better-considered authorities being, "whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it." When such authority is express, the matter is usually free from difficulty, but the authority may be implied and on a given state of facts admitted or established, frequently is conclusively implied, and responsibility imputed as a matter of law. In other cases, where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized. And, again, the absence of authority may be so clear that it becomes the duty of the judge to determine the matter, as he did in this instance.

In *Wood on Master & Servant* may be found a very extensive and satisfactory discussion of this question.. In section 279, p. 535, the author says: "The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act, for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can, in no sense, be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master expressly conferred, or

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fairly implied from the nature of the employment and the duties incident to it." And again, the same author, in section 307, says: "The simple test is whether they were acts within the scope of his employment, not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders."

Applying these principles to the facts before us, we are of opinion that the ruling of the judge below was clearly correct. As stated, the plaintiff was voluntarily in the office of King (the superintendent) to look after business in his own interest, and the company owed him no independent duty. Granting that King had power to select and employ the plaintiff as agent of the company, when he told the plaintiff that the company did not wish to employ him, he had filled the measure of his duty; and when King went further, whether from bad temper or malice or from righteous indignation, and proceeded to insult and defame the plaintiff, he was entirely beyond any authority given him either expressly or which could be fairly implied from the nature of his employment or the duties incident to it; and for such conduct, therefore, King, as an individual, and not the company, is responsible. The general principles here applied will be found very fully and clearly discussed in two recent opinions by this court delivered by Justice Walker—*Daniel v. Railroad*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, and *Jackson v. Tel. Co. supra*. And our disposition of this case is sustained by well-considered decisions of the federal court in *Text-Book Co. v. Heartt*, 136 Fed. 129, 69 C. C. A. 127, and *Gas Light Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543. There is nothing in *Hussey v. Railroad, supra*, that in any way militates against our present decision. That was a case in which the complaint charged that defendant company had maliciously slandered the plaintiff. There was a demurrer, which admitted that the defendant had uttered the words, and the decision simply held, as we have here, that a corporation could under given circumstances be held responsible for the malicious torts of its agents. The question of when or under what circumstances the acts of the agent will be imputed to the company was in no way involved.

There was no error in directing a nonsuit, and the judgment below is affirmed.

GALVESTON, H. & S. A. RY. CO. *v.* CURRIE *et al.*

(Supreme Court of Texas, Oct. 31, 1906.)

[96 S. W. Rep. 1073.]

Death—Actions for Causing—Master's Liability—Acts of Servant—Statutory Provisions.*—Conceding that the statute, giving an action against railroad companies for death caused by the unfitness, negligence, or carelessness of their servants, requires that the death be "negligently," as distinguished from "willfully," caused, it is not essential to liability that death should result from an act unintentionally done, and, if the servant negligently does an act with no purpose of inflicting injury, but it proximately causes death, the railroad is liable.

Same—Scope of Employment.—Where one employed in a railroad roundhouse, while using compressed air in the line of his duty, in sport turned it on a subordinate, causing his death, the railroad was not liable.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Mrs. Orb Currie and others against the Galveston, Harrisburg & San Antonio Railway Company. A judgment in favor of plaintiffs was affirmed by the Court of Civil Appeals (91 S. W. 1100), and defendant brings error. Reversed.

Baker, Botts, Parker & Garwood, Newton & Ward and W. B. Teagarden, for plaintiff in error.

Nat. B. Jones and Carlos Bee, for defendants in error.

WILLIAMS, J. This writ of error brings before us a judgment of the Court of Civil Appeals of the Fourth district (91 S. W. 1100), affirming a judgment of one of the district courts of Bexar county against plaintiff in error, and in favor of defendants in error, the widow and children of J. B. Currie, for damages resulting to them from his death, charged to have been caused by the negligence of the plaintiff in error.

The facts out of which the questions arise may be stated thus: The act which caused Currie's death, and for which the railroad company is charged with responsibility, was committed by one Nicholls, who was employed by it as one of its engine dispatchers in its roundhouse in San Antonio, and had, under his direction and control, a number of subordinates, among whom were Currie, who was an engine wiper, and one Spahn, who was a hostler. Nicholls, when on duty, had "the care, custody, and control of things used there [in the roundhouse] for the purpose of getting engines in and out," and his duties required him to have all necessary work done on engines; to receive them when they came in; to get them ready, and dispatch them out when wanted for use on the road. His testimony admits of the construction that

*See preceding case, and foot-notes.

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his duties were such as to include the right, when he thought proper to do so in their performance, to use the compressed air with which the roundhouse was supplied, as stated below. And it was the duty of himself, or of any of the employees to put out a fire on an engine when they saw it. Currie's duties were to clean engines, and to do whatever else in the roundhouse he might be ordered to do. By means of a main pipe of iron passing through it overhead, the roundhouse was supplied with compressed air, passing through the pipe from a storage tank, and from this main pipe there led downward into each engine stall a smaller pipe, also of iron, to which a rubber hose, one-half inch in diameter, could be screwed, for the purpose of using the air as a motive power; its pressure ranging from 40 to 100 pounds to the square inch. Each of these smaller pipes had upon it a globe valve, by which the amount of air turned into the hose could be regulated. "Cracking" the valve, as used by the employees, meant the turning of it partially on. This compressed air was used, as shown by the testimony, as a motive power, for loading wheels or heavy machinery, for running gear motors, for drilling and riveting, for cleaning flues, by boiler makers and machinists in the performance of their various duties, and in any other way when it could serve a proper purpose. On the occasion when Currie received the injury from which he died, Spahn, the hostler, had brought into the roundhouse an engine with an oil burner in the ash pan of which oil was burning. Up to this time water had been used to extinguish fires in the engines, but, no water hose being at hand, Spahn, for the first time, and as an experiment, determined to use the compressed air to blow the fire from the ash pan, and, having attached a hose to one of the pipes, requested Currie, who was standing by to turn the valve. He succeeded in thus blowing out the flame, but the loud noise thus made attracted Nicholls and other employees to the spot. The fire was then out, and Currie had shut off the air, but Nicholls, apprehending that the valve confining the oil in the engine might not be properly set, and that escaping oil, running over the hot surface, might reignite, directed Spahn to go upon the engine and see to the condition of the valve, taking from Spahn the hose which was still attached to the air pipe, and directed Currie to "crack" or turn on the air. Some statements in the record, which counsel for defendants in error regard as presenting the aspect of the facts most favorable to them, are to the effect that Nicholls thus held the hose charged with air to be ready to blow out any fire that might spring up in the engine. This will be assumed to be true for the purposes of our decision. As Spahn ascended the engine, Nicholls turned the hose so as to strike him with the escaping air, causing him to jump and the bystanders to laugh. He then, almost immediately, according to some of the evidence, turned the hose upon Currie, so that the air struck him about the buttocks. That this was done in sport as a practical joke is conclusively shown by the evidence. No ill effects were at once noticed; but, after a few moments, Currie became

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sick, and complained that he was hurt, and, upon subsequent medical examination and an operation, it was demonstrated that the air had entered through the clothing into the rectum, perforated and lacerated the intestines in many places, and escaped into the abdominal cavity outside of the bowels, eventually causing death. The physician who testified to these facts stated that neither he nor any of the other doctors with whom he talked about the case believed that such a thing could be possible until the unquestioned facts proved it, and that it was the most remarkable accident of which he had ever heard.

The charge of the trial court submitted the cause to the jury under the ordinary rule, by which a master is made responsible for acts of his servant done in the line of his duty, and in the scope of his employment. The verdict necessarily affirmed that the act of Nicholls was of the character to make the railroad company liable under that rule, and the Court of Civil Appeals, in affirming the judgment, held that the evidence warranted such a finding. This presents one of the principal questions now to be decided. Beyond this, counsel for defendants in error contend that liability of the railroad company is established under a principle laid down in the authorities, which, in effect, declares that one who keeps in his possession, or employs in his business, that which, unless carefully guarded and used, is dangerous to others, is bound to exercise proper care to see that it is so kept and used as not to inflict injury; and the negligence of any one into whose care it is committed by the owner, either in failing to properly guard it, or in improperly using it, is that of the owner; and it is claimed that this is true where the servant or custodian, as in this case, employs the dangerous thing, not in the line of his duty or for any purpose of serving the master, but for his own purposes; the contention being that this is a violation of the duty of the servant to safely keep it.

Another question, the consideration of which naturally comes first in order, is made by counsel for plaintiff in error by the contention that an action is not given by the statute of this state for a death caused as that of Currie was. The statute gives such action against railroad companies when the death is caused by the "unfitness, negligence, or carelessness of their servants or agents." There is no pretense that this death was caused by unfitness of Nicholls, and the proposition is that it did not result from his negligence or carelessness, but from his willful and intentional act. The meaning of this statute was to some extent considered in *Lipscomb v. Railway Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804, in which a much more plausible contention on the part of the defense was overruled. In that case the employees of the defendant intended to kill the person at whom they shot, but negligently executed the master's orders in mistaking the person slain for a burglar. Here the servant intended not to kill, but only to play a harmless prank, and, in the effort to do so, mistakenly employed means which caused death. If it be true that the statute re-

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quires that the death be "negligently," as distinguished from "willfully," caused, it does not follow that the act from which the death results must be unintentionally done. Thus restricted, the statute only requires that the death be caused by negligence, and it seems plain that, if the servant intentionally does an act with no purpose of inflicting injury, but so does it as proximately to cause death, the result is due to his negligence or carelessness. Indeed, in a large proportion of the injuries resulting from negligence, an act is intentionally, but negligently done, while its mischievous consequences are unintended. We therefore hold that there is nothing in this contention.

But we cannot agree that the evidence, regarded in its strongest light for plaintiffs, warrants the conclusion that Nicholls' act was done in the prosecution or furtherance of his employers' business. The case is controlled, in our opinion, by the proposition, in which all authority agree that when the servant turns aside, for however short a time, from the prosecution of the master's work to engage in an affair wholly his own, he ceases to act for the master, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone. Let it be conceded that in holding the hose in readiness to put out any fire that might again flare up, Nicholls was performing a duty as servant, and that had he, while thus holding it, or in attempting to use it for the purpose for which it was held, negligently turned it against one of the other employees, his negligence would have been imputable to his employer as incidental to the effort to do that which was in the line of the servant's duty. It may be further conceded that if, in directing the hose at a fire to put it out, he had also struck with it one of the other servants, either to make him get out of the way, or for some other purpose, the motive thus partly influencing his act towards such other would not deprive it of its legal character, as done in the master's business. It is in cases of the character supposed, where there has been a mingling of personal motive or purpose of the servant with the doing of his work for his employer, that much of the difficulty and conflict of opinion have arisen in determining whether or not the wrong committed should be ascribed to the master or be regarded as the personal tort of the servant alone. It is now settled, in this state at least, that the presence of such a motive or purpose in the servant's mind does not affect the master's liability, where that which the servant does is in the line of his duty, and in the prosecution of the master's work. But, when he goes entirely aside from his work, and engages in the doing of an act not in furtherance of the master's business, but to accomplish some purpose of his own, there is no principle which charges the master with responsibility for such actions. These principles were accurately stated in the charge of the trial court; but the error was in assuming that the facts presented any basis for a recovery under them. The fact that Nicholls, while holding the hose, conceived the purpose of using it, and did use it, upon the employees, in sport, is undisputed, and is wholly inconsistent with any assumption that he

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was then in any way attempting to serve the defendant. His act was a clear departure, for the time, from that service, and the quickness with which it was done cannot be made the test. If the turning aside from the master's business be only for an instant, so that it be complete, the authorities agree that there is no liability on his part for the servant's act. 1 Thomp. on Neg. 526, and cases cited. If a miner or butcher stand with pick or knife raised to dig or to stab an animal for the master, and, seeing his enemy before him, turn the tool upon him as a weapon to kill him, would any one argue that the master should be held accountable for the death? Where is the difference if the instrument be used merely to frighten for the amusement of the servant. The only difference between such cases and other personal wrongs committed by persons who happen to be employees of other persons, is the fact that in the cases supposed the servants misuse the implements intrusted to them by their masters. But that certainly is no reason for charging the master, as cases almost numberless will show. *I. & G. N. Ry. Co. v. Cooper*, 88 Tex. 610, 32 S. W. 517; *Railway v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Golden v. Newbrand*, 52 Iowa, 59, 2 N. W. 537, 35 Am. Rep. 257; *Howe v. Newmarch*, 12 Allen (Mass.) 49.

In the old English case of *Croft v. Alison*, 4 Barn. & Ald. 590, the distinction between an act of a servant done in his master's interest, and one done wholly for himself, while at the same time serving the master, is sharply drawn. The court thus stated the doctrine: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform the master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty * * * the master will be liable; being an act done in pursuance of the servant's employment." In the case last supposed, the result would be the same, although the act of the servant were also malicious. Two other cases, which may be referred to as apt illustrations, are *Hankinson v. Lynn Gas & Electric Co.*, 175 Mass. 272, 56 N. E. 604, and *Evers v. Krouse* (N. J. Err & App.) 58 Atl. 181, 66 L. R. A. 592. In the Massachusetts case a servant of the defendant, who had ascended a pole for the purpose of replacing burned carbons in the lamps with new ones, struck the plaintiff, who was driving along the street, in the eye with one of the rejected carbons. Some of the evidence tended to show that this was done in the course of the servant's duty in merely throwing the carbon to the ground, while other evidence was to the effect that, in order to attract plaintiff's attention so as to speak to him for purposes of his own, the servant threw the missile at plaintiff's team. The court held that the liability of the master depended on the question of fact thus raised, and that this was properly submitted to the jury by a charge, which instructed that the defendant would be liable if the carbon was thrown "for the purpose of carrying out and performing his [the servant's] duty in his employment," but would not be liable if the carbon was thrown "to carry out

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some whim of his [the servant's] own, in accordance with some impulse of his own, and not for the purpose of carrying out or accomplishing the purposes for which he was then and there employed." In the Evers Case, the defendant's son, treated as his servant, while engaged in sprinkling defendant's lawn with water by means of a hose, turned the water upon plaintiff's horse, causing it to run away. The liability was made to depend on the question of fact whether or not the boy threw the water on the horse in the work of sprinkling, or departed from that, and did the act mischievously and for his own amusement. The court thus clearly expressed the true doctrine: "An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master, in any sense, and should not be deemed to be so as a matter of law. As to it the relation of master and servant does not exist between the parties, and, for the injury resulting to a third person from it, the servant alone should be held responsible. *Aycrigg's Ex'rs v. New York & Erie R. R. Co.*, 30 N. J. Law, 460; *Rounds v. Del., Lack., & West. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359."

Exactly this distinction was made by this court in the cases of *H. & T. C. Ry. Co. v. Bell*, 97 Tex. 73, 75 S. W. 484; *Denison & Sherman Ry. Co. v. Carter*, 98 Tex. 196, 82 S. W. 782, 107 Am. St. Rep. 626; *Branch v. I. & G. N. R. R. Co.*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844; *Dawkins v. G. C. & S. F. Ry. Co.*, 77 Tex. 232, 13 S. W. 984; *I. & G. N. R. R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517. In the last-cited case the engineer and fireman intending to play a practical joke on plaintiff, by injecting cold water into his pocket through a hose, by mistake turned on hot water and steam. The gist of the decision is expressed in these sentences: "In this case, the fireman and engineer were, at the time the injury was inflicted, in the employ of Campbell, receiver, and were engaged in the performance of a service to him; that is, they were operating a locomotive, each performing his duty as engineer or fireman. The injury, however, did not occur from anything done in the performance of such duty, but by the independent act of the servants, in nowise connected with the duties thus being performed. It is true that circumstances might have required the discharge of hot water from the boiler by means of the appliances used in this instance, but, upon this occasion, the evidence shows that the act done, was not for the purpose of discharging a duty, but simply as one of sport and mischief on their part towards the injured party." In that case the time consumed in the departure of the servants from the master's service was probably longer than in this, but that can make no difference in the principle, the fact of departure being clear and distinct.

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The many cases in which railroad companies have been held liable for the consequences of the acts of the servants in so using in malice or sport the whistle, the steam, or other parts of locomotive engines, or the engines themselves, under their control, as to frighten animals or people have been placed either on the ground that the acts were in the performance of duty to the employer, the purpose of the employee merely accompanying it, or upon the doctrine which we will presently discuss as to the liability of the master for the conduct of his servants in keeping and using extra dangerous instrumentalities and agencies committed into the charge of the servants. These authorities do not at all dispute the principle applicable when the servant in the discharge of his ordinary duties steps aside therefrom to accomplish some end wholly his own, and, in doing so, inflicts injury. Counsel for defendants in error, however, argue, as indicated at the beginning of this opinion, that there is an enlargement of the liability of the master for the acts of the servant when the latter is intrusted with the custody and control of highly dangerous agencies employed in the business of the master, by which the master is made responsible, not only for acts and omissions of the servant in the course of his employment, but for any misuse of such agency for his own purposes, and not in the execution of any duty to the master. Since no question as to the existence of facts which may be necessary to establish such a liability was submitted to the jury, everything essential to its existence would have to be admitted or conclusively established by the evidence before we could affirm the judgment on that theory. The doctrine relied on is thus stated by Judge Thompson; "Every person who employs highly dangerous agencies upon his premises or about his business stands under the obligation of exercising, to the end that third persons shall not be injured through those agencies, a degree of care proportionate to the danger of such injury. This has been characterized as a very high degree of care, and in some cases, according to one view, the person employing the agency is liable as an insurer. If a person employing such an agency commits the custody of it to his servant, he thereby commits to the servant the obligation to discharge his own duty of caring for it, so that it will not injure third persons. If, while so charged with this duty, the servant negligently abandons the custody of it, so that a third person is injured in consequence of this negligence, the master will be liable; and it will make no difference at all with his liability, whether, in so abandoning the duty, the servant did so for the purpose of affecting some purpose of his own, or in furtherance of the business of his master. In either case the master committed to the servant the discharge of a duty which the law has imposed upon the master for the safety of third persons, and the servant has abandoned that duty; and this is enough to render the master liable, without any regard to the motive of the servant. This may be illustrated by the case where a railway

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company furnished its servants with dynamite cartridges to be placed upon the track, for the purpose of alarming trains approaching other trains in times of fog, darkness, storm, etc., in which the ordinary signals cannot be seen. The servants of the company playfully placed some of them on the track, in order to frighten some ladies with whom they were acquainted, and one of them was left there, and was picked up by a child, who carried it some distance, and then caused it to explode, injuring another child. It was held that the railway company was liable to pay damages. The railway company was under the duty of keeping the dangerous agents carefully guarded. It committed this duty to its servants. It was not merely their duty to use them, but also to guard them, and, for the failure of this duty, the master was liable, on the footing of its being negligence within the scope of the employment of the servants." 1 Thompson on Neg. § 523. Again, in section 532, the same author says: "So, a master who employs dangerous agencies upon his premises, or in the prosecution of his business, and commits such agencies to his servants, thereby commits to them his own obligation of using care in respect to them to the end that third persons be not injured by them, and he is responsible for the negligence of his servants in discharging this obligation, although they may have been guilty of the act of negligence, for the sole purpose of accomplishing some object of their own outside the scope of their employment." This seems to be an accurate summing up of the cases cited by counsel for plaintiff, and to be as strong a statement as sound principle will allow.

In the application of the law thus laid down, these questions arise: (1) Is the compressed air introduced by the defendant into its roundhouse shown to have been so dangerous that a person of ordinary prudence so using it would have adopted special precautions for guarding it to prevent injury to others? (2) Were the arrangements made by the defendant for keeping it such as would have been employed, as sufficient, by such a person considering its character and the danger likely to result from its presence and use? (3) If not, did the death of Currie result from the want of such care on the part of defendant or of its servants into whose custody the agency was committed, which includes the further question, whether or not Nicholls' act, in diverting the air from any use to which he was authorized to put it for the defendant and converting it into a plaything, is to be imputed to the defendant as a failure to perform its duty to properly guard it? To fix liability on the defendant all of these questions must be determined in favor of plaintiffs. As to the first, it seems to be assumed that the question whether or not the thing used is of so dangerous a nature as to impose the special duty of guarding it, is one of law to be decided by the court. But this is obviously not true as a general proposition. In the absence of some positive law forbidding or regulating the keeping or use of the thing, the fundamental question is one of negligence *vel non*, depending, as in other cases of neg-

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ligence, upon the inquiry whether or not there has been a neglect or violation of the duty which the law imposes upon all persons to use due care in the use of their property or the conduct of their business to avoid injury to others. Some of the older cases in England seem to assert the absolute liability of an insurer, but it is settled in this state that the question is one of negligence. (*Railway v. Oakes*, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835), and this becomes a question of law only, as it becomes such a question in other cases, when the facts are undisputed and allow but one reasonable conclusion. Obviously, the same reflections apply to the second question stated. It is by no means clear that the evidence was sufficient to have authorized a finding in favor of the plaintiffs on those questions (the first and second), but it is clear that it would not justify this court in holding that the necessary facts are conclusively established. Further elaboration upon these propositions is unnecessary, because we are of the opinion that the answer to the third question is conclusive against the plaintiffs. We cannot agree to the proposition to which this contention would come that, because an instrumentality may become dangerous to others, its owner, when he commits it to his servant to be employed in his business, makes himself responsible for everything the servant may do with it. His responsibility is for the management of his business by the servant, and not for injuries done by the servant's independent conduct of his own affairs. In such matters, it may be granted that the exercise of proper care for the safe keeping of the dangerous thing is the duty of the master, and that the omission of that care by the servant is, in law, the omission of the master. But when the servant employs the thing, not in the master's service, but wholly as an instrument of malice or amusement, he takes himself for the time of the employment. It is true that when using such an instrument for his own purposes to injure or frighten others or to amuse himself the servant is not keeping it safely; but it is true also that in the act he does, he is not representing the master, and the injury he inflicts is the result of that act, and not of a mere failure to properly keep. As was said in *Railway v. Cooper*, 88 Tex., at page 609, 32 S. W., at page 517: "The dangerous character of the machinery does not affect the question, because the injury did not result from the dangers connected with the operation of the machinery." The distinction is not technical merely but is made necessary by the reason upon which the rule respondeat superior rests.

For reasons of public policy the law holds the master responsible for what the servant does, or omits, in conducting the master's business, because the master has voluntarily substituted for his personal management and supervision that of the servant. But the law also recognizes that the servant is still an independent and responsible being, with capacity, which the master cannot efface or control, to engage in projects of his own, and does not include in the responsibility laid upon the master liability for those acts of the servant which are but the exercise of his free-

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dom about his own affairs. The fact that the servant, in pursuing his own business or pleasure, neglects also to perform some duty which rests upon the master, may make the master responsible if injury fall upon another as the consequence of that neglect; but that is a very different proposition from that maintained by plaintiffs, asserting liability for an injury resulting, not from the mere neglect, but from the positive personal wrong of the servant. This may be illustrated by reference to the leading case in this country upon the subject which is stated in the section above quoted from Thompson on Negligence. *Railway Co. v. Shilds*, 47 Ohio St. 387, 24 N. E. 658. The injury there was not inflicted by the servant in the attempt to play a joke, but resulted from his negligence in leaving the cartridge where the children found it; in other words, from his failure to safely keep it. The question we are discussing would have arisen if the servant in the effort to injure or frighten, and not in the performance of any duty, had caused damage by exploding the cartridge. A liability might have arisen also, if the car, in passing over the cartridge, had exploded it, and injured some person, because the injury would have resulted from the movement of the defendant's car over its track in the doing of its business; and it is upon this ground we think the judgment in *Euting v. Railway*, 116 Wis. 13, 92 N. W. 358, 60 L. R. A. 158, 96 Am. St. Rep. 936, may be sustained. The doctrine, or at least some of the reasoning, in the *Shields Case*, has been criticised by other courts (*Obertoni v. Railway* [Mass.] 71 N. E. 980, 67 L. R. A. 422; *Sullivan v. Railway* [Ky.] 74 S. W. 171), and there are some broad statements of doctrine in that as well as in the *Euting Case*, and in others following them which, if separated from the facts in the minds of the courts, would tend to sustain plaintiffs' contention; but the conclusions reached upon the facts in those cases do not seem to conflict with the views we express. Among the other decisions most relied on as applying the doctrines of those cases are *Harriman v. Railway*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507; *Alsever v. Railway* (Iowa) 88 N. W. 841, 56 L. R. A. 748; *Merschel v. Railway* (Ky.) 85 S. W. 710; *Barnmore v. Railway* (Miss.) 38 South. 210, 70 L. R. A. 627; *Mattson v. Railway* (Minn.) 104 N. W. 443, 70 L. R. A. 503.

It may be just to charge a master with liability for the failure of a servant to properly guard a dangerous agency, with the duty of guarding which the servant has been intrusted, when, in consequence of such failure, injury proximately results to another; but to say that the master, assuming that there has been no negligence in selecting and retaining the servant, is liable for the independent act of that servant in diverting the thing from the master's business, and using it in his own, or as an instrument of malice or amusement, is to lose sight of the principle underlying the whole subject. The distinction is thus illustrated in the *Shields Case*: "To better illustrate the ground of this distinction, we may, for example, suppose a servant, with others under his control, employed with a construction

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MOUNT, C. J. Action for personal injuries. Plaintiff recovered a judgment for \$5,000. Defendant appeals.

The appellant operated a line of electric street railway between Seattle and Renton, a distance of 12 miles. The line consisted of a single track, with numerous switches and side tracks or turnouts. There were but two through cars between Seattle and Renton. There were four or five local cars running between Seattle and Rainier Beach, which was a station some eight miles out of Seattle. The respondent was employed as a motorman on one of the through cars. These two through cars were called express cars by reason of the fact that they were not required to stop at all of the stations and street crossings, and because it was the duty of the local cars which stopped at each street crossing to turn out on the sidings in order that the through cars might pass them. All the cars ran on schedules fixed by the railway company. The railway company had constructed a block-light system, known as a single-block system, between Norman street and Lane street in the city of Seattle. The distance between these two streets was 1,665 feet. There were sidings at Norman street and at Lane street, but none between these points. The grade was not level, but the railway line was straight between these points so that a car could be seen in the day time from one end of the block system to the other, except in foggy weather. Norman street was further south from Seattle than Lane street. Renton was in a southerly direction from Seattle. The block-light system consisted of five poles about equal distance apart, one pole being at Lane street, one at Norman street, and the other three between these two extremes. On each of these poles were two red incandescent electric lights. When the lights were turned on at Norman street by means of a rope or lever, one red light burned on the north side of each pole through to Lane street. When the lights were turned on at Lane street, they burned on the south side of each pole through to Norman street. The lights could be turned off only at the point where they were turned on. These lights were for use in the nighttime and in foggy weather. The motormen on all cars were required to turn on the lights when entering the block and the next car back was required to turn the lights off. It was the duty of conductors to see that the motormen turned the lights on and off. On the morning of October 25, 1904, respondent, as motorman on his car, left Renton for Seattle. When he arrived at Norman street he says he was a little late, a minute or two. The morning was very foggy. He found the lights turned to the north, indicating that a car was preceding him through the block. The lights were not burning to the south. The conductor on respondent's car told respondent to proceed through the block. Respondent thereupon proceeded at the rate of about eight miles per hour, and, at about the middle of the block, after he had gone a distance of 870 feet, he collided with a car coming south, and was severely injured. The motorman on the south-bound car had neglected to turn on his lights south, and had proceeded with those lights not burning.

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Respondent stated that if these lights had been thrown on, he would have seen them and the accident could not have happened. The motorman on the south-bound car testified that he did not turn his lights on because the conductor on the car preceding respondent's car had just come through the block and changed to the car south bound, and said that the north lights were his lights thrown on by him as he had just come through the block. There was dispute at the trial as to what the rules of the company were with regard to the use of the lights, the company claiming that the motormen were prohibited from passing a burning light which such motorman himself had not turned on, while respondent's evidence was to the effect that motormen were only prohibited from running on lights pointing against the way his car was going. We must assume, for the purpose of this case, that the rule of the company was as stated by the plaintiff. The question is then squarely presented, whether the failure of the conductor and motorman, whose duty it was to turn the lights on, which they neglected to do, rendered the company liable to the respondent. In other words, were the motorman and conductor on the one car fellow servants of the motorman and conductor on the other car?

It seems to us that there can be no escape from the conclusion that they were fellow servants. They were each engaged in the same common employment, meeting and passing each other frequently and associating together every day. This case cannot be distinguished from the case of *Grimm v. Olympia Light & Power Company* (Wash.) 84 Pac. 635, except in immaterial particulars. It is true, in the *Grimm Case* there was no fixed schedule of running time, and the motormen themselves arranged the places of meeting; and it is also true there were no conductors in the *Grimm Case*, and that the motormen had sole charge of their cars. These are the only facts in which the *Grimm Case* differs from this case in the point at issue. The fact that there was no fixed schedule was one of the facts which was claimed as negligence of the company in the *Grimm Case*. But, under the circumstance of that case, no fixed time was practicable or could be established. In this case there was a fixed schedule for all cars, and it is not claimed that the motormen were incompetent or inexperienced or that they did not know the time schedule for each car. The number of cars was not great and the motormen and conductors were required to know, and did know, the schedule time of each car. So the fact that there was a schedule was in favor of the appellant and not against it. While there was a conductor in charge of each car in this case, the conductor's authority over the motorman extended only to starting and stopping of the cars and in collecting fares. In regard to the speed of the car, the handling of the lights, and meeting cars and the like, the duties of the motormen and conductors were co-ordinate. It is conceded that it was the duty of the motorman when he entered the block to turn on the light without any order from the conductor. But it was the duty of the conductor to notice the light and

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see that the motorman did his duty in that respect. If one was negligent, both were. There is, therefore, no question of superior servant in regard to turning on the light, which is conceded to have been the act of negligence which caused the collision and injury. In *Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949, we held that a brakeman was not a fellow servant with a conductor on his train, because in that case the brakeman was subordinate to the conductor and was not required to place signals except upon orders of the conductor. In that case the superior servant doctrine was therefore applicable and was sustained. In *Conine v. Olympia Logging Company*, 36 Wash. 345, 78 Pac. 932, we held that a signal man was not a fellow servant with the engineer of a logging engine, where the master had furnished no means of communication from the engineer to the signal man. That case can have no controlling influence in this case, because here the master had provided means of communication which was sufficient for the purpose and which appliance was not used by either servant. In the case of *Northern Pacific R. R. Co. v. O'Brien*, 1 Wash. St. 599, 21 Pac. 32, this court held that a conductor and engineer on a railway train were not fellow servants with employees on a work train, but this rule had not been applied to street railway cases. The reasons therefor are given in *Grimm v. Olympia Light & Power Co.*, *supra*. A large number of cases are cited where we have permitted one servant to recover from the master by reason of negligence of another servant. But those have been cases where the negligence was the omission of some positive duty of the master. It is unnecessary for us to cite these cases here, or to review them at length for in such cases as well as cases not cited, we have uniformly recognized the rule that the master is not liable for injuries resulting to a servant by the negligence of a fellow servant. *Millett v. Puget Sound, etc., Works*, 37 Wash. 438, 79 Pac. 980; *Stevick v. N. P. Ry. Co.*, 39 Wash. 501, 81 Pac. 999. The questions usually presented have been whether the facts in particular cases bring the injured party within the rule of fellow servant. In determining who were fellow servants we have said that servants must not only be engaged in a common employment, but must have opportunity to use precautions against each other's negligence. *Grimm v. Olympia Light & Power Co.*, *supra*, and cases there cited. In this case the motormen were engaged in the same common employment, that of operating street cars over the same line. They necessarily met each other every hour of the day, because the time from Seattle to Renton consumed but 47 minutes. They took their cars from the same barn, and the same rules were furnished to each. There was such co-association and co-operation in the same line of employment as that each one necessarily knew the habits and capacity of the other and had opportunity of exercising mutual influence upon the other. This made them fellow servants within the rule which we have heretofore laid down. It is true that one of the allegations of negligence in the complaint was that the master failed

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to furnish a sufficient block system upon the block where the collision occurred, but the respondent testified that, if the motorman on the south-bound car had turned his lights south when he entered upon the block, the accident could not have occurred; because respondent in that event would have seen the lights and remained at Norman street or returned to that point. It was nowhere claimed that the light system was defective in its construction or operation, and the statement that the accident could not have happened if the light had been used, indicates that the system was sufficient for the purposes for which it was intended, and was reasonably safe, which is all that is required. *C. & E. I. R. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. The respondent knew the system; he had worked under it for about 18 months, and had made no complaints concerning it. He knew the rules required the motorman to turn on the lights on entering the block. The rules and system were for the protection of the motormen as well as for the protection of passengers. The appliances were reasonably safe and it was the duty of the motorman to use them for the purpose of preventing collisions and delays. Under the evidence of respondent above stated, assuming that he was correct in his construction of the rules that it was the duty of the motorman on the south-bound car to turn his light, it was the duty of the trial court to take the case from the jury upon the motion of the appellant, upon the ground that the act of negligence directly causing the collision was the act of a fellow servant. It may be said, in justice to the trial court, that the case of *Grimm v. Olympia Light & Power Company* had not been decided when this case was tried.

The judgment is reversed, with directions to the lower court to dismiss the action.

CROW, ROOT, and RUDKIN, JJ., concur.

FULLERTON, HADLEY, and DUNBAR, JJ., dissent.

CINCINNATI TRACTION CO. v. HOLZENKAMP.

(Supreme Court of Ohio, June 26, 1906.)

[78 N. E. Rep. 529.]

Carriers — Injury to Passenger — Presumption of Negligence.* —
Proof of the falling of a trolley pole from an electric car, when it

*For the authorities in this series on the question whether a presumption of negligence is created by the fact that a passenger is injured, see foot-note appended to *Paul v. Salt Lake City R. Co.* (Utah), 19 R. R. R. 45, 42 Am. & Eng. R. Cas., N. S., 45; *Louisville & N. R. Co. v. Board* (Ky.), 19 R. R. R. 51, 42 Am. & Eng. R. Cas., N. S., 51; *Omaha St. Ry. Co. v. Boesen* (Neb.), 19 R. R. R. 100, 42 Am. & Eng. R. Cas., N. S., 100; *Firebaugh v. Seattle Elec. Co.* (Wash.), 19 R. R. R. 107, 42 Am. & Eng. R. Cas., N. S., 107; foot-note appended to *Kansas City, etc., R. Co. v. Nichols* (Miss.), 19 R. R. R. 330, 42 Am. & Eng. R. Cas., N. S., 330; foot-notes appended to *Tiborsky v. Chicago, etc., Ry. Co.* (Wis.), 18 R. R. R. 131, 41 Am. & Eng. R. Cas., N. S., 131; *Williams v. Spokane, etc., Ry. Co.* (Wash.), 18 R. R. R. 278, 41 Am. & Eng. R. Cas., N. S., 278.

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stopped at a usual stopping place, upon a person standing there for the purpose of getting upon the car, raises the presumption of negligence on the part of the traction company, and, unless rebutted, the party injured is entitled to recover.

(Syllabus by the Court.)

Error to Superior Court of Cincinnati.

Action by Anna Holzenkamp against the Cincinnati Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff, Anna Holzenkamp, recovered a judgment against the defendant, the Cincinnati Traction Company, for personal injuries received by her by the falling of the trolley poles or one of the trolley poles of one of defendant's cars as she was about to step upon it on a street in the city of Cincinnati. She avers that she was standing in the street at a point where the car would be supposed to stop; that the car stopped, and thereupon, just as she was about to step upon the car, the trolleys fell and struck and injured her, by reason of the negligence of the defendant, in that the trolleys were defective and were improperly handled. The defendant offered no evidence, excepting as to the extent of the plaintiff's injuries. The undisputed facts are that the plaintiff and three other ladies were standing in the street where there was a "Y" in the track of the defendant and to which place the car would come from the "Y" onto the main track, and where it usually stopped for passengers. The plaintiff and her sister intended to take the car. The sister signaled the car to stop, and it did so, but whether in response to her signal or because it was its usual stopping place does not appear. The car was a kind that is operated by means of double trolleys, and the conductor in charge of the car was trying to place the trolleys on the wires at the time the car stopped, when the pole of one or both of the trolleys snapped and one or both fell, striking the plaintiff before she had placed herself in contact with the car.

Before argument the court at request of plaintiff gave the following instruction to the jury: "If the jury find from the testimony that the plaintiff had gone to the corner of Franklin avenue and Harrison avenue, and that thereupon the car of the defendant came to said point and stopped for the purpose of taking the plaintiff on board as a passenger, and that it was at a point near the corner where the cars of the defendant were in the habit of stopping to take on passengers, and that plaintiff was standing in the street adjacent to and by the car track along which the car came going to the city, and that the plaintiff intended to get on the car and was about to do so, and the car stopped at the point where she was standing to enable her to do so; and if the jury find that, just as the plaintiff was about to step on the car, she was struck by the broken or falling trolley, then I charge you that, for the purposes of this case, the plaintiff was a passenger on the car, and if the plaintiff was then and

there struck and injured by the trolley breaking and falling upon her from the said car, then the presumption arises in the absence of other proof that the traction company was guilty of negligence." And in its general charge the court said: "The law is, as applied to the facts of a case like this, that if a piece of iron or heavy metal which forms part of an overhead apparatus of a railroad of this character breaks and falls down and injures somebody, even one passing by, but more particularly one who is there in proper position to and is about to become a passenger upon this railway, that there the law raises a presumption, out of the mere fact that the thing occurred, that it occurred through the negligence of the defendant. And if no evidence is introduced to you by testimony that this apparatus had been properly inspected, that it was properly built, and that it was, in all respects, such as is usual and proper, and was in a proper condition, and therefore that the accident was simply an accident which no foresight could have prevented, then you are justified in presuming from the occurrence of the accident itself, that it was through either some defects of the apparatus which could have been remedied and ought to have been remedied, and would have been discovered by proper inspection, or that it resulted through some careless and improper handling, whereby it was made to fall down and produce this injury."

Outcalt & Foraker, for plaintiff in error.

Charles W. Baker, for defendant in error.

SUMMERS, J. (after stating the facts). The record does not show an exception to the giving of the special charge, so that the question so ably argued is not presented by the record. The special charge seems to have been fashioned after the ruling in *Brian v. Bennett*, 8 C. & P. 724, where an omnibus stopped to take on a person who had hailed it, but started just as he was putting his foot on the step so that he was thrown down and injured. The court said: "I think that the stopping of the omnibus implies consent to take the plaintiff as a passenger, and that it is evidence to go to the jury." It is to be observed that the facts here are materially different and that the instruction goes farther, and that its correctness may be questioned. The relation of carrier and passenger arises from contract. The passenger must expressly or impliedly have agreed to compensate the carrier to transport him, and the carrier must expressly or impliedly have agreed to carry him, and performance of the contract must have been commenced and the passenger be under the care of the carrier. But, as has been said, the question is not presented in the record, and even if an exception to the charge had been noted, it would not have been necessary to determine the question, for the court held that the maxim "*res ipsa loquitur*" applied, and, in effect, instructed the jury that there was a legal presumption that the defendant was negligent from the fact the trolley fell and injured the plaintiff although she was not a passenger, but only about to become one.

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It has been held in some cases that the maxim applies only where the relation of carrier and passenger exists, but, while the presumption may arise when that relation exists from circumstances that in the absence of such relation would not give rise to it, attention to the reason of the maxim and to decided cases as well will show that it does not depend upon the existence of that relation. In Cooley on Torts, 799, the learned author says: "The rule applied to carriers and passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care." In Judson v. Giant Powder Co., 107 Cal. 549, 555, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, which was a case of destruction of property by an explosion of dynamite, Garoutte, J., says: "As was well said by the court in Rose v. Stephens, etc., Co. (C. C.) 11 Fed. 438: 'Undoubtedly the presumption has been more frequently applied in cases of carriers of passengers than in any other class, but there is no foundation of authority or reasons for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relation between the parties.' The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is the duty which the law enjoins upon him, and the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care toward this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the nature of the relations existing between the party insuring and the party insured. The presumption arises from the inherent nature and character of the act causing the injury. Presumption arises from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown." The maxim is thus stated by Shearman & Redfield on Negligence (5th Ed.) § 59: "Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured any one, is enough to make out a presumption of negligence. When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

The following cases selected at random from a much longer list, will serve to illustrate the application of the maxim in cases

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where the relation between the parties was not based upon contract: *Mullen v. St. John et al.*, 57 N. Y. 567, 15 Am. Rep. 530, is one of the earliest and a leading case in this country. In that case the wall of a building fell out and a person standing on the sidewalk was injured by the bricks and mortar. It was held that the maxim implied. In *Scott v. London Dock Co.*, 3 Hurl. & Colt. 596, an injury had been caused by the falling of bags of sugar on the plaintiff as he was passing by a warehouse. The court said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In *Richmond Ry., etc., Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736, the plaintiff's horse took fright from the sudden stopping of an electric car and an unusual volume of smoke coming from under it. In *Campbell v. Consolidated Traction Co.*, 201 Pa. 167, 50 Atl 829, the plaintiff was seated in his wagon which was standing on a track of the defendant's road in one of the streets of the city of Pittsburg. In front of him were two cars, the second car in front of him moved across the track on an ascending grade. The trolley pole slipped from the wire and the car stopped and then slipped backward about 60 feet and struck the car back of it, and the force of the collision drove the rear car against the plaintiff's horse and wagon, or the motorman of that car moved it backward to avoid a collision. In *Uggla v. West End Street Railway Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, the plaintiff, while driving on Park Square in Boston, was struck by a broken iron attached to a wire guy. The iron was part of an ear used to clasp a trolley wire and applied to it a strain from the guy, in order to keep the trolley wire in place around a curve and over the defendant's track. The ear broke with the strain, and one part of it fell, striking the plaintiff on his head. In *Manning v. West End Street Railway Co.*, 166 Mass. 230, 44 N. E. 135, a switch stick flew from the hands of the conductor as he was using it on the top of an electric car and injured a person on the sidewalk in the street. The conductor was using the stick to free a trolley which had caught in the frog at the junction of some overhead wires. Similar accidents had occurred there half a dozen times before. Held, in an action for personal injuries, that there was evidence of defendant's negligence, either in defective construction of the trolley wires and poles, or in the conductor's use of the switch stick. In *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156, the hind wheels of plaintiff's wagon became entangled with one of the defendant's wires which was swinging across a public highway. Held, that the fact, unexplained and unaccounted for, that the wire was in such a condition, was, in itself, evidence for the jury on the issue of negligence of the defendant. In *Hogan v. Manhattan Railroad Co.*,

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149 N. Y. 23, 43 N. E. 403, a piece of iron fell from an elevated railroad structure in a city street upon a person lawfully in the street. In *Clarke v. Nassau Electric Railroad Co.*, 9 App. Div. (N. Y. 51, 41 N. Y. Supp. 78, the plaintiff's horse stepped upon one of the rails of the defendant's tracks, sprang into the air, and fell down upon the track, where it died in a few minutes. The plaintiff also received a shock when he seized the hames of the harness. In *Jones v. Union Railway Co.*, 18 App. Div. (N. Y.) 267, 46 N. Y. Supp. 321, one of the span wires that supported the trolley wires of defendant's railroad broke and swung to the sidewalk where it struck and injured the plaintiff. In *O'Flaherty v. Nassau Electric Railroad Company*, 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96, a trolley wire used in connection with the defendant's railroad broke and fell to the ground, and the current shocked the plaintiff. This case is approved without report in 165 N. Y. 624, 59 N. E. 1128.

The plaintiff was not only lawfully in the street, but she stood where she had an implied invitation from the defendant to stand, and it was the duty of the defendant to use reasonable care to avoid injuring her; and the court was warranted in taking judicial notice of the fact, as it did, that such a thing as the breaking of the trolley pole and the falling of the trolley with a portion of the pole does not happen in the ordinary course of events, unless there was some negligence either in its construction or in the management of it; and, this being so, the court very properly charged the jury that the plaintiff, in the absence of any evidence tending to rebut the presumption of negligence, was entitled to recover for her injuries.

The judgment is affirmed.

PRICE, CREW, and SPEAR, JJ., concur.

SOUTHERN RY. CO. v. BORN STEEL RANGE CO.

(Supreme Court of Georgia, Aug. 17, 1906.)

[55 S. E. Rep. 173.]

Carriers—Carriage of Goods—Inability to Find Consignee—Duty of Carrier.—Upon inability to locate a consignee and deliver to him a shipment of freight, a common carrier, if informed that the ownership of the property is in the consignor, is under a duty to hold the shipment a reasonable length of time subject to his order.

Same—Freight Charges—Enforcement—Sale of Goods.*—While the consignor may be called on to pay charges for freight and storage, the carrier cannot lawfully, pending an adjustment of its claims and without affording the consignor an opportunity to pay all just demands against him, dispose of the shipment at public auction sale for the purpose of enforcing collection of freight and storage charges.

*See foot-notes appended to *Southern Ry. Co. v. Webb* (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26.

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To do so amounts to a conversion of the property, notwithstanding the sale was brought about by officials of the carrier who were misinformed as to the true status of the matter.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Action by the Born Steel Range Company against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

By consent of the parties this case was tried by the presiding judge, without the intervention of a jury, upon the following agreed statement of facts, together with certain documentary evidence thereto attached: On October 25, 1901, the Born Steel Range Company shipped by the Wheeling & Lake Erie Railroad Company, at Cleveland, Ohio, one range, with accompanying fixtures, to F. W. Foster, at Savannah, Ga. The shipment was transported by that company and its connecting lines, being duly turned over to the Southern Railway Company as one of the connecting carriers. By accepting and receiving the shipment the Southern Railway Company became a party to, and adopted, the contract entered into by and between the initial carrier and the plaintiff, and agreed to transport and deliver the shipment to the consignee in Savannah. The range and fixtures arrived in Savannah, over the Southern Railway, on November 11, 1901. In accordance with the local custom prevailing in that city as to giving notice to consignees, the Southern Railroad Company sent notice through the mail, addressed to the consignee in Savannah, Ga., on November 11, December 21, 28, 30, and 31, 1901, of the arrival of the shipment, all of which notices were returned by the post-office authorities with the information that the consignee could not be located. The shipment was kept on hand by the Southern Railway Company, in Savannah, until June 7, 1902, when the same was sent to Toccoa, Ga., and disposed of at a sale of the accumulated freight of the company. A request was received by the Southern Railway Company from the plaintiff to return the shipment, which request was made before the shipment was sent to Toccoa and while it was in the possession of the company; but as storage charges had accumulated thereon, the company claimed it had no authority to waive the same, and it was necessary to take the matter up with the Southeastern Car Service Association. This consumed time, and when the Southern Railway Company was ready to consign the shipment to the plaintiff, it was ascertained that the range fixtures had already been disposed of by the company at Toccoa, as aforesaid, for accumulated freight charges thereon in compliance with the Code. The value of the shipment in October, 1901, was \$74, and it was of that value at the time of its arrival in Savannah. At the sale the range, etc., did not bring enough to pay storage, freight, and other charges there.

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From letters attached to, and forming a part of, the agreed statement of facts, it appears that the explanation given by the railroad officials concerning the failure to deliver the shipment to the consignee or to return it to the plaintiff was that the consignee was not a resident of Savannah, and the local agent could not locate him; that the Born Steel Range Company, though aware that the shipment had arrived at destination, did not exhibit much interest in getting it disposed of, and when that company finally asked that the shipment be returned, storage charges to a considerable amount had accrued, and it took some little time to get that feature of the case straightened out; and that when the manager of the Southeastern Car-Service Association finally consented to cancel the storage, the shipment had been sent to Toccoa for sale, had been advertised in accordance with law, and the company realized nothing whatever, as charges amounted to considerable more than the freight. The officials took the position that "it was the shipper's fault in not showing consignee's post-office address in the shipping directions," coupled with "the fact that the consignee himself did not apparently make an effort to get the range." It appears from a letter dated January 27, 1902, written by the Born Steel Range Company to an agent of the initial carrier, that the consignor had, after repeated efforts to have the shipment traced, concluded it was lost, and thereby notified the agent that unless the shipment was located by the first of the month, it would be charged to the account of his company; and if found, the shipper would require its return free of all expenses, "on account of being astray." The bill of lading, which was attached to the agreed statement of facts, recited that the consignee was "F. W. Foster, Savannah, Ga.," and did not disclose that his post-office address was McIntosh, Ga. After hearing the argument of counsel, the trial judge announced his finding in favor of the plaintiff, and judgment against the defendant was subsequently entered up for the sum of \$74, with interest from November 19, 1901. To this judgment exception is taken by the railway company.

Osborne & Lawrence, for plaintiff in error.

O'Connor, O'Byrne & Hartridge, for defendant in error.

EVANS, J. (after stating the facts). It affirmatively appears that the defendant railway company duly performed its duty as a common carrier to safely transport the shipment to destination. After placing the shipment in a place of safety, the liability of the company as an insurer ceased, and its liability as a warehouseman began, unless the local custom prevailing in Savannah as to giving notice to consignees entered into and became a part of the contract of shipment. *Ga. & Ala. Ry. v. Pound*, 111 Ga. 6, 36 S. W. 312. However this may be, the company is not chargeable with any default in failing to observe this local custom or in not making delivery to the consignee, who could be located. Relatively to him, the company had a stat-

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utory right to dispose of the shipment at public auction, upon compliance with the requirements of Civ. Code, 1895, § 2303, after waiting upon him without avail until June 7, 1902, to appear and pay freight and warehouse charges. But some time prior to that date, the company had received notice that the consignor was the owner of the shipment; and even if it was under no legal duty to have previously notified the consignor of its liability to locate the consignee (*American Sugar Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383), the company was under a duty, after becoming informed of the ownership of the property, to hold the shipment a reasonable time subject to the order of the consignor. Of course, the company had a lien on the property for freight charges (Civ. Code, 1895, § 2287), and the consignor would be under an obligation to settle with the company for the freight and storage charges before exercising the right to receive the shipment at Savannah or to direct a reshipment of the property. *Penn. Steel Co. v. Ga. R. Co.*, 94 Ga. 636, 21 S. E. 577. Before it was sent to Toccoa for sale at public auction, the consignor had requested the railway company to return the shipment. The charges claimed thereon were not, it is true, tendered to the company by the consignor; yet the reason why this was not done appears to be that the officials of the company undertook to get the consent of the Southeastern Car-Service Association that the claim for the accumulated charges might be waived. As pointed out by counsel for the railway company, there seems to have been no consideration for this undertaking, and the company was not bound to carry out its understanding with the consignor as to remitting storage charges in the event the necessary consent of the association could be secured. Still, the company's officials having gratuitously entered upon the project, the consignor was relieved for the time being of offering to pay the company's demand, and, until the matter was finally adjusted, no right to sell the shipment at public auction could arise. Having induced the consignor to rely upon the promise to endeavor to remit a portion of the charges, the company is estopped from asserting that the promise was without consideration. It was at liberty at any time to abandon its efforts along this line and to demand, as a condition precedent to the surrender of the shipment, payment in full and of all lawful charges for freight and storage; but until such a demand and a refusal by the consignor to comply therewith, the company could acquire no right to sell the property upon the idea that there had been a default in making payment of its just demands. The sale of the property, pending the negotiations with respect to fixing the amount which the consignor would be called on to pay, was a conversation. That this conversation was brought about through a misunderstanding on the part of some of the company's officials as to the true status of the matter cannot affect the question of the company's liability; it, at least, was bound to know how the matter stood, and is responsible for the wrongful acts of its officers in disposing

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of the property at auction sale. It may be that it was the right of the company to plead that it acted in good faith and through the mistake of some of its officers or servants, and for this reason should be allowed to set off against the plaintiff's claim such lawful charges as the plaintiff would have been under a duty to pay before getting possession of the shipment. But no such plea was filed, no evidence was submitted as to the amount of the charges which the company was entitled to collect, and the sole contention urged upon the trial was that the company was not liable in any amount to the plaintiff. This being true, the admitted value of the property was the only measure by which the plaintiff's recovery could be fixed; and, ruling only upon the single question presented for our determination, viz., whether or not a conversation of the property was shown, we hold that the trial judge arrived at a proper solution of this question.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

BROADWOOD v. SOUTHERN EXPRESS CO.

(Supreme Court of Alabama, July 6, 1906.)

[41 S. E. Rep. 769.]

Carriers—Limitation of Liability—Requirement of Notice of Loss—Reasonableness.*—A stipulation, in a contract with a carrier for the transportation and delivery of goods, that it and every other carrier to whom the same may be delivered for transportation shall not be liable for any loss unless the claim therefor shall be presented in writing within 90 days after the date of the receipt, with receipt attached, is reasonable.

Same—Waiver—Pleading—Sufficiency.—In an action against a terminal carrier for loss of goods, the carrier pleaded the failure of the consignee to give notice of damage within 90 days, as stipulated in the contract of carriage. A replication alleged that within 90 days after the date of the shipment the consignee called at the office of defendant and made inquiry for the goods, and was advised that the goods had not arrived; that he thereupon telegraphed to the shipper requesting that the initial carrier trace them; that the shipper, with the sanction of the agent of the initial carrier and within 90 days after the date of the shipment, wrote to the initial carrier's office of the nondelivery of the goods and inclosed a copy of the receipt; and that within 90 days after the shipment the initial carrier was advised of

*For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Eckert v. Pennsylvania R. Co. (Pa.)*, 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475; *Baltimore & O. R. Co. v. Hubbard (Ohio)*, 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71; *Smith v. Chicago, etc., Ry. Co. (Wis.)*, 15 R. R. R. 180, 38 Am. & Eng. R. Cas., N. S., 180.

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the nondelivery of the goods, whereupon it began an investigation for the recovery thereof and waived the provision in the contract requiring a claim for the goods to be made in writing. Held, that the replication did not show a waiver of the stipulation by the terminal carrier.

Same—Loss of Goods—Amount of Recovery.†—A carrier, when sued for nondelivery of goods intrusted to it for transportation, claimed that at the time of the shipment the value as given by the shipper was stated at a specified sum. No fraud or deceit was practiced on the carrier by the shipper. The failure of the carrier to deliver the goods resulted from its own negligence. Held, that the consignee was entitled to recover the value of the goods, though exceeding the valuation fixed by the shipper.

Same—Loss of Goods—Proximate Cause.‡—Where the proximate cause of loss of goods was the negligence of the shipper in making or packing, the carrier is not responsible.

Same—Nondelivery of Goods—Excuse—Pleading—Sufficiency.—A plea by a carrier, sued for the nondelivery of goods, which alleges that before it ascertained that the same was intended for plaintiff the plaintiff had left the United States, preventing the carrier from delivering the goods to him, and the carrier did not receive instructions from him to deliver the goods to any other person, was demurrable because it contained no matter of avoidance of the fulfillment of the carrier's contract, and failed to show an attempt by notice through the mails or otherwise to effect a delivery.

Pleading—Defective Plea—Replication—Sufficiency.—Where a plea is bad, the sufficiency of a replication to it will not be considered.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by L. J. Broadwood against the Southern Express Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

There were a number of pleas and demurrers in the cause, but the opinion sufficiently discusses all of them except the replication to the fourth plea, which was as follows: "For further answer to this plea, the plaintiff says that the provisions of the contract under which defendant received the goods, to the effect that the Great Northern Express Company, and every other company to whom said goods may be delivered or intrusted for transportation, should not be liable for any loss

†For the authorities in this series on the subject of the amount recoverable for loss or injury to freight as affected by the fact that the shipper has stated its value to the carrier, see foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787.

‡For the authorities in this series on the subject of the liability of a carrier as affected by negligence or wrong on part of the shipper or consignee, see foot-notes appended to *Louisville & N. R. Co. v. Smitha* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775.

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or damages unless the claim thereof should be presented in writing at the shipping office within ninety days after the date of the receipt, with receipt attached to such statement, was without consideration, and was therefore void. And for further answer to this plea plaintiff says that within ninety days after the date of the shipment of the goods in question, and after ample time had elapsed for the arrival of said goods at Mobile, he called several times at the defendant's office at Mobile, and made inquiry for goods and was advised by the defendant's agent that said goods had not arrived, whereupon he telegraphed to M. M. Fry, at Bonners Ferry, Idaho, the shipper of the goods, that the said goods had not arrived at Mobile, and to have the Great Northern Express Company trace them; that said M. M. Fry, with the knowledge and sanction of the agent of the Great Northern Express Company at Bonners Ferry, Idaho, and within ninety days after the date of the shipment of said goods, wrote to the Great Northern Express Company at St. Paul, Minn., which was the office of the president of the Great Northern Express Company, of the nondelivery of the goods, and inclosed in said letter a copy of the receipt which was given at the time of the shipment of said goods; and that within ninety days after the shipment of said goods and after ample time had elapsed for the arrival of said goods at Mobile, the Great Northern Express Company was advised of the nondelivery of said goods at Mobile, whereupon the Great Northern Express Company began an investigation for the recovery of said goods and waived the provision in the contract under which it received said goods, requiring claim for said goods to be made in writing at shipping office accompanied by receipt."

The following demurrers were filed to these replications: "(1) Said replication shows that the common carrier agreed to transport said goods, which was a sufficient consideration. (2) Because the plaintiff is claiming under said contract, and cannot at the same time allege that it is void. (3) Because said replications do not traverse, confess and avoid, nor set up an estoppel as to the facts alleged in said plea. (4) It does not show that the Great Northern Express Company had authority to waive any provision of the contract so far as this defendant is concerned."

Plea 2-D, filed by the defendant, was as follows: "The defendant admits the receipt of said package, and says that before it ascertained that the same was intended for plaintiff, the said J. L. Broadwood, he had left the United States, thereby preventing defendant from delivering said package to him, and the defendant did not receive instructions from him to deliver it to any other person."

The following demurrers were interposed to this plea: "Said plea does not offer an excuse for not effecting a delivery of the package constituting the subject-matter of the suit. Said plea contains no matter in avoidance of the fulfillment of its contract

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as a common carrier of goods. Said plea shows no attempt, by notice through the mails or otherwise, to effect a delivery of the package."

Inge & Ambrecht, for appellant.

J. H. Webb and *Joel W. Goldsby*, for appellee.

HARALSON, J. By amendment the second count of the complaint was withdrawn, leaving only the first count which is one claiming of the defendant damages for failure to deliver goods received by it as a common carrier, to be delivered to the plaintiff at Mobile, Ala.

The fourth plea sets up, "that under the provisions of the contract made under which the goods were received, it was provided that the Great Northern Express Company and every other company to whom said property might be delivered or intrusted for transportation, should not be liable for any loss or damage unless the claim therefor should be presented in writing at the shipping office within ninety days after the date of the receipt, with receipt attached to such statement; and defendant alleges, that this was not done, and therefore, the plaintiff ought not to recover in this action."

This plea was demurred to on the ground, that the stipulation in the contract of shipment releasing defendant from liability to plaintiff, unless claim be presented at the shipping office in 90 days after the date of receipt with receipt attached to such statement, is an unreasonable regulation and not binding on the plaintiff.

It may be that the plea is subject to demurrer on other grounds than the one assigned, but we can only consider the plea with respect of the specific ground of demurrer assigned.

The reasonableness vel non of a stipulation of the kind under consideration is one of law for the determination of the court. Whatever may be the decisions of the courts of other states and of the Supreme Court of the United States, this court is committed to the proposition that a contract fixing 30 days as the time within which such claims must be presented is not reasonable. *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South. 664; *Southern Express Co. v. Owens* (June 30, 1906) 41 South. 752.

But these cases are not conclusive of the question as to whether 90 days should be considered reasonable. On the contrary we have held, that a rule of a telegraph company, that it will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed with the company for transmission, is a reasonable one. *Harris v. Western Union Telegraph Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70. It was there held, that the rule did not purport to, nor did it in effect limit the defendant's liability for negligence, but only required reasonable notice to the defendant of claims for damages. See, also, *Wolf*

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v. Western Union Tel. Co., 62 Pa. 83, 1 Am. Rep. 387; *Young v. Western Union Tel. Co.*, 34 N. Y. Super. Ct. 390; *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264, 22 L. Ed. 556.

In the case last cited it was said, "Whether their rules (telegraph company rules) are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

So on the authority of the case of *Harris v. Western Union Tel. Co.*, *supra*, we hold that the provision in the contract of shipment requiring the claim for damages to be presented within ninety days is reasonable and the demurrer as assigned was properly overruled.

The demurrers to the replications to plea 4 were properly sustained. It is true that stipulations such as the one set up in the plea may be waived, or the carrier may estop itself from invoking it, as a shield from liability, but neither of the replications is sufficient to show a waiver by the defendant company.

This brings us to consideration of plea 5 and the demurrer thereto. That plea is as follows: "And for further answer to the complaint the defendant says that at the time of the shipment of said package the value thereof as given by the shipper, was stated at \$225.00, and that the plaintiff ought not to have and recover of the defendant an amount exceeding such valuation."

It will be observed that no fraud or deceit is alleged as having been practiced on the carrier by the shipper, and under the plea, notwithstanding the failure of the carrier to deliver the goods, may have been the result of its own negligence, and the real value of the goods may have been greatly in excess of the valuation fixed, still the recovery of the plaintiff would be limited to the amount set out in the plea. Under our more recent decisions the demurrer to the plea was well made and should have been sustained. *Southern Ry. v. Jones*, 132 Ala. 437, 31 South. 501; *Southern Express Co. v. Owens* (June 30, 1906) 41 South. 752.

Plea 2-A set up as a defense to the action, that the name of the consignee of the goods was defectively given in the bill of lading issued for them, and on the package containing them when shipped. The rule on this subject is, that when it appears that the proximate loss or injury to the goods was the negligence of the shipper in marking or packing them, or in some other respect, the carrier cannot be held responsible. 6 Am. & Eng. Ency. Law, 266, and authorities cited; 5 Ib. 370.

It may be that this plea, if tested by proper objections to it, was defective—a question we do not decide; but it does not appear that it was subject to the demurrer interposed to it, and the same was properly overruled.

Plea 2-D was faulty, and was subject to the demurrer, that it contains no matter in avoidance of the fulfillment of its contract as a common carrier of goods, and shows no attempt by notice through the mails or otherwise to effect a delivery of the

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package. The demurrer to it should have been sustained. It may be added that it is not demurred to on the ground, that it assumes that defendant was ignorant of the consignee of the goods, before he left the United States.

As this plea is bad, there appears to be no necessity for considering the replications to it. For the error in overruling the demurrer to plea 2-D and plea 5, the judgment must be reversed.

Reversed and remanded.

WEAKLEY, C. J. and DOWDELL and DENSON, JJ., concur.

LOUISVILLE & E. R. Co. v. VINCENT.

(Court of Appeals of Kentucky, Oct. 17, 1906.)

[96 S. W. Rep. 898.]

Carriers—Railroads—Injuries to Passenger—Separate Coach Act—Liability.—Ky. St. 1903, §§ 795-800, impose on railroads the duty of furnishing separate compartments for the accommodation of white and colored passengers, and upon the roads' agents the duty of assigning such passengers to their respective compartments. Section 799 requires conductors to refuse to carry any passenger declining to occupy a compartment to which he is assigned and authorizes conductors to put such passenger off the train. Held, that where defendant railroad's conductor permitted a negro to occupy a seat in the coach reserved for white passengers, and thereafter, on an altercation over the payment of fare, attempted to eject such negro, thereby creating a panic among the other passengers, defendant was liable for injuries received by plaintiff, a white passenger, through falling from the platform of a car while attempting to escape from the difficulty.

Same—Custom.—Defendant was not exempt from liability by reason of the fact that, by custom prevailing on its road, it had permitted colored passengers, when their own compartment was crowded, to ride in that set apart for white passengers.

Trial—Instructions—Definition of Legal Terms.—Defendant's conductor permitted a negro passenger to occupy a seat in a coach reserved for white passengers, and thereafter, on a difficulty over the payment of fare, attempted to eject such negro from the train, during which difficulty plaintiff, a white passenger, was injured. Held, that an instruction in an action to recover damages for such injury, if the agents and servants of defendant in charge of their car, through their negligence, brought about or permitted or participated in a riot or rout, etc., without defining such terms, was not erroneous as misleading the jury.

Same—Failure to Request.—A party cannot complain of a failure to define certain technical terms used in an instruction, where he does not offer or ask for an instruction on that point.

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Appeal—Misconduct of Counsel—Objections.—Alleged misconduct of counsel for a party will not be considered on appeal, where the bill of exceptions fails to show that any objection was made to the statements complained of when made.

Trial—Statements of Court—Irregularity.—Where it was agreed that an affidavit filed by defendant in support of a motion for continuance might be read as a deposition of an absent witness, for whose absence the continuance was asked, and the court told the jury, after the reading of the affidavit by the party introducing the same, that they must consider the affidavit as the deposition of such witness, its action in stating that defendant desired a continuance, and for that reason filed the affidavit, was at most a mere irregularity, and not prejudicial to defendant.

Carriers—Railroads—Negligence—Injuries to Passengers—Damages—Excessive Verdict.—Where plaintiff, a passenger, fell from a car, striking her head and neck severely enough to render her unconscious for a short while, and was thereafter confined for several months to her home under the treatment of a physician, and suffered from severe pains in the back of her head and neck, and continued to do so for six months thereafter, during which time she lost 30 pounds in flesh, a verdict in her favor for \$2,250 was not excessive.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

“Not to be officially reported.”

Action by Anna D. Vincent against the Louisville & Eastern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Neal & O'Neal, for appellant.

Willis & Todd and *Johnson & Hiatt*, for appellee.

NUNN, J. This is an appeal from a verdict and judgment for \$2,250. The appellate corporation, the Louisville & Eastern Railroad Company, operates an electric line between Louisville and Beard Station, in Oldham county, Ky., and by section 842a of the Kentucky Statutes of 1903 is made subject to the same duties and responsibilities and given the same rights, powers, and privileges which other railroad corporations have under our law. The appellee, who is a white lady about 60 years of age, became a passenger on one of appellant's cars going from Louisville to Anchorage, Ky., on November 27, 1904. She was assigned to a seat in the compartment of the car set apart for white passengers. Some time after she boarded the car, three negroes were assigned to seats in the white compartment by the conductor, where they were permitted to remain until after the difficulty which terminated in appellee's injury. As the car passed Ormsby Station, one of the colored men, who was sitting in the white compartment, called the conductor's attention to the fact that his ticket called for Ormsby, and that he had taken him past that station. The conductor proposed that he

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get off at the next station, which is called "Ridgeway." The negro protested against this because there was no depot at Ridgeway, and insisted in being carried to Lakeland or Anchorage, where he could get a car coming back to Ormsby Station. The conductor told him he could not ride to Anchorage without paying another fare. This the negro did under protest. Something that he said in protesting against the payment of the additional fare seems to have caused the conductor to decide to put him off. Appellee's testimony is to the effect that the negro said to the conductor in an ordinary tone of voice, at the time he handed him the extra nickel, "There goes a nickel into my sinking fund." The conductor states, however, that when the negro handed him the nickel he became boisterous and appeared to be drunk. The conductor then caused the car to be stopped on a fill between Ridgeway and Marritt's Station. At this time the negro was sitting, and the conductor took hold of the lapel of his coat, and attempted to eject him from the car, but in so doing by some means he fell back between the seats on the opposite side of the aisle, still holding the negro by his coat, and the latter having a like hold upon him. According to appellee's testimony, the negro was bending over the body of the conductor, being held in that position by the latter. Appellant's evidence tends to show that the negro was down on the conductor; but the testimony of neither side shows that the conductor or the negro attempted to beat or bruise each other. At this point the motorman entered the car and struck the negro twice on the head with his controller, or brake handle. The commotion which ensued created a panic among the occupants of the car, the white passengers rushing therefrom. The appellee fled from the car to the rear platform, and in attempting to alight in some way missed her footing and fell down the embankment, striking her head and neck severely enough to render her unconscious for a short while. Upon regaining consciousness, she went to the front of the car, where she was finally helped aboard of the same. At Anchorage she was taken from the car and assisted by some strangers to the Louisville & Nashville Railroad Company's depot, and carried to her home at Simpsonville, where she was confined for several months, under the treatment of a physician, and suffering from severe pains in the back of her head and neck, and was still suffering therefrom at the time of the trial—six months after her injury. She had lost 30 pounds in flesh during this time. The testimony of the appellant does not vary greatly from that of appellee, except in the particulars mentioned. The conductor admitted that he assigned the negroes to seats in the white compartment, giving as a reason therefor that he had instructions from the company to do so when the colored compartment was crowded; but he further testifies that there were at least two vacant seats in the colored compartment at the time. It also appears from his testimony that, after the negro in question was put off the car, the other two colored passengers found seats in the compartment set apart for members of their race.

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Appellant's counsel urge four reasons for a reversal of the judgment: First, error in the instructions; second, misconduct of appellee's counsel in his argument to the jury; third, the improper action of the court during the trial; and, fourth, excessive damages. Of these in their order.

It is insisted by counsel for appellant that the court erred in refusing to give the following instruction offered by it: "The court instructs the jury that it was the duty of the conductor in charge of the defendant's car, at the time and place complained of in the petition, to preserve good order among the passengers thereon; and if they believe from the evidence that the said conductor, while discharging said duty in good faith, was suddenly and violently assaulted by one of the passengers, and was thereby placed, or apparently placed, in imminent peril of great bodily harm, or loss of life, and that in order to save him from such injury or harm, then or there threatened, or about to be done, the motorman of the defendant struck or took hold of said passenger so assaulting said conductor, believing same to be necessary for the protection of said conductor, and used no more force than was necessary, or apparently necessary, to free the said conductor from the danger then and there threatened, or apparently threatened to be done him, then the law is for the defendant, and the jury should so find." We are unable to perceive upon what theory of law such an instruction could have been given in this case. No decision or authority of any kind is cited in support thereof. Such an instruction might have been proper upon a trial of the motorman for assault and battery committed upon the negro, but had no application whatever to the issue being tried in this case.

It is admitted that appellant operates a railroad, and that sections 795 to 800 of the Kentucky Statutes of 1903 impose upon it the duty of furnishing separate compartments for the accommodation of its white and colored passengers, and upon its agents and servants the duty of assigning white and colored passengers to their respective compartments, and the statutes provide a penalty upon the railroad corporation, and also upon the servants in charge of the car for a violation thereof. Section 799, Ky. St. 1903, reads as follows: "The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach, or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off of the train. And for refusal and putting off the train, neither the manager, conductor nor railroad company shall be liable for damages in any court."

This court has outlined the duty of the railroad companies and their employees under the separate coach act in the case of *Quinn, etc., v. Louisville & Nashville Railroad Company*, 98 Ky. 231, 32 S. W. 742. That was a suit by a negro woman

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against the railroad company for damages sustained by her by reason of a drunken white man being permitted to remain in the coach set apart for colored passengers. The court, in that case, said: "If, as we shall assume was the case each one of the passengers had been assigned the coach required by the statute, and the white passenger had left his coach and gone into the coach with these colored people without the knowledge of the conductor, while he was attending to his duties in the other cars, and had there abused and insulted the appellant, it is plain no action could be maintained against the company, but when the white passenger is assigned to the car set apart for those of another race the company will be held responsible for his bad conduct affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring, and where the conductor, or those managing the train, know that one is in the wrong car, it is his duty to expel him, and by consenting to his remaining, the company becomes responsible for his conduct so long as he does remain. If a contrary rule is applied and no liability exists on the part of the corporation to the passenger, the separate coach law becomes a dead letter, and those who are entitled to its protection have no means of enforcing its provisions but by indictment, where a penalty may be adjudged in favor of the state. It is made the duty of conductors, under heavy penalties, to execute this law, and where there is a neglect of duty for which a penalty is imposed, and private injury results from this neglect, a cause of action arises in favor of the person injured. This is the universal rule applicable to such cases, and should be made to apply to the facts of this case. It may be contended that the white passenger having been assigned to his proper coach, and then leaving it without the knowledge of the conductor, exempts the company from liability unless the conductor knows of the wrongs being committed, or the purpose of the passenger, by reason of his conduct, to mistreat passengers. This would, perhaps, be a rational conclusion unless it further appeared the conductor, or those controlling the train, knew of the white passenger's presence in the colored compartment, and took no steps to require him to leave. Here the conductor assented to his remaining in the car until he dispatched his business with the old negro, and the company should be held responsible for his conduct so long as he remained, and any other construction of the duties of corporations and their agents, arising from the passage of this law, would nullify its provisions or amount to a disregard of the manifest purpose of the Legislature in enacting it. It would enable passengers and railroad officials to violate this law with impunity, and tend to increase the mischief the statute is intended to prevent. The court should have told the jury that 'the law required the corporation to provide separate coaches or compartments for its white and colored passengers, and if the agents of the corporation permitted the white passenger to enter into the coach set apart for colored passengers, or if the agents or servants, when seeing him in the

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car, permitted him to remain in the coach, the company is responsible for his subsequent conduct, and liable in damages for the maltreatment, if any, of the plaintiff, although the conductor may not have been present when the obscene and profane language, if any, was used by the white passenger.' See, also, the case of *Wood v. Louisville & Nashville Railroad Company*, 101 Ky. 703, 42 S. W. 349."

It appears from the record that during the introduction of the testimony it was agreed that this difficulty in the white compartment caused the passengers therein to leave the car, and it may be reasonably inferred that as a result of permitting the colored passengers to remain in the compartment set apart for white passengers, the difficulty arose which was the proximate cause of appellee's injuries; but counsel for appellant contends that, by custom which prevailed on its road, it had permitted colored passengers to ride in the compartment set apart for white passengers, when their own was crowded, and that it could not, therefore, be held liable for injuries resulting therefrom. But we fail to see that such a custom, even if it existed, could annul the positive requirements of the law. If such a custom prevailed, it would reduce the separate coach law to a dead letter.

Appellant also complains of instruction No. 1 given to the jury, in which the court in substance uses the following language: 'That if the agents and servants of appellant in charge of the car through their negligence brought about or permitted or participated in a riot or rout, etc. It is complained that the court gave these technical legal terms without defining them, and the jury could not understand their meaning, and were misled thereby. We are of opinion that, under the facts and circumstances established in this case, the jury were not at a loss to understand the meaning of these words; but if we are mistaken in this, appellant is not in position to complain, for it did not offer or ask for an instruction upon this point.

The second reason assigned is the misconduct of counsel for appellee in his closing argument. The bill of exceptions does not contain the language complained of, nor does it show that appellant objected and excepted to the statements at the time they were made. In the case of *Illinois Central Railroad Company v. Radford*, 64 S. W. 511, 23 Ky. Law Rep. 886, it is said: "But we fail to find in the bill of exceptions that any objection was made to the statements complained of at the time they were made, hence we cannot consider that question." To the same effect is *Alexander v. Menefee*, 64 S. W. 855, 23 Ky. Law Rep. 1151, and *Stepp v. Hatcher*, etc., 67 S. W. 819, 23 Ky. Law Rep. 2441.

Appellant insists that the court was guilty of irregularity in explaining to the jury the nature of an affidavit which was filed in support of a motion made by appellant for a continuance, and which appellee consented might be read as the deposition of the absent witness. In the stenographer's report of the testimony the

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following appears: "Counsel for defendant thereupon read in evidence to the jury the affidavit for continuance filed in the case. The court explained to the jury the nature of said paper, to which explanation the defendant by counsel excepted, the portion of said statement excepted to being the statement of the court to the jury that the defendant wanted a continuance, and for that reason had filed the affidavit." The stenographer does not pretend to quote the exact language of the court in explaining to the jury that the affidavit which was read to them was to be considered as the testimony and deposition of the absent witness, and there is nothing in the record which shows the exact language used by the court. But considering the stenographer's transcript, we fail to see how the defendant could have been prejudiced by the statement of the court. The court merely told the jury they must consider the affidavit read as the deposition of the absent witness, and if the jury learned from the statement of the court that appellant desired a continuance because of the absence of this witness, it was a trivial irregularity at most, and certainly could not have materially prejudiced the rights of appellant.

The fourth and last reason urged for reversal is that the verdict is excessive. To this we cannot agree. If appellee's evidence be true (and the jury had the right to believe her witnesses), she has experienced great suffering, and sustained probably permanent injury as a result of the difficulty herein set forth; and, in view of all the circumstances, it seems to us that the verdict of the jury is both reasonable and conservative.

For these reasons, the judgment is affirmed.

PARK *et ux.* v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Oct. 3, 1907.)

[58 S. E. Rep. 931.]

Carriers—Passengers' Effects—Liability for Loss.—A railway company is not responsible for a passenger's baggage, which is shown never to have been delivered to it.

Same.—Where there was no joint contract between carriers to carry passengers and their baggage, but distinct tickets were bought, and the second carrier, to accommodate a passenger, gave its check for baggage before receiving it from the first carrier, the second carrier, on showing that the baggage was never received, or that it exercised due care in delivering the baggage received, is relieved from liability for its loss.

Same—Baggage Check—Nature.*—A railroad baggage check is not a contract, but a receipt, and is *prima facie* evidence of a delivery of baggage to the carrier.

*See note, 2 Am. & Eng. R. Cas., N. S., p. xxxlv.

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Same—Baggage—Action for Loss—Complaint—Sufficiency.—A complaint in an action for loss of a passenger's baggage, which alleges that plaintiff holds the check of the carrier, only alleges evidence of delivery, and is bad for failing to allege a delivery, of the baggage to the carrier.

Pleading—Complaint—Allegation of Parties.—A complaint must set forth the material facts, and where it sets forth evidence, and omits a material allegation, it is bad.

Carriers—Loss of Baggage—Prima Facie Evidence.—Where a railway company issued to a passenger its check for baggage, without having received the same from another company, for the purpose of accommodating the passenger, the check was prima facie evidence of a delivery to it of the baggage, rebuttable only by direct proof that the baggage was never received.

Husband and Wife—Actions—Parties.—Under Code Civ. Proc. 1902, § 138, providing that persons having an interest in the subject of the action may be joined as plaintiffs, a husband and wife may join in an action ex contractu for loss of baggage, consisting of articles belonging to each.

Appeal from Common Pleas Circuit Court of Greenville County; R. C. Watts, Judge.

Action by A. K. Park and wife against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and remanded for new trial.

Cothran, Dean & Cothran, for appellant.

Haynesworth & Patterson, for respondents.

POPE, C. J. This action was begun by the plaintiffs, A. K. Park and Leila G. Park, in February, 1904, to recover \$185, the value of a trunk alleged to have been lost by the defendant railway. It appears that early in September, 1903, the plaintiffs, being in New York and wishing to return home, about an hour and a half prior to their departure turned their trunk over to the McDonald Express Company for delivery at the Twenty-Third Street station of the Pennsylvania Railroad. The plaintiff A. K. Park testified that he saw the trunk at the station, identified it, and saw the agent of the railroad company strap a check thereon. The plaintiffs took passage to Baltimore, where they stopped over for about 24 hours, but, not needing the trunk, and therefore without finding out whether it had arrived or not, they exchanged checks with the agent at Baltimore and continued their journey to Washington, where they made a second stop. They arrived at Washington, according to the testimony, about dusk, and the next morning about 9 o'clock Mr. Park called for his trunk, but after careful search by both himself and the agent it could not be found. Nor was it found prior to the time the plaintiffs left Washington for Greenville, their home. The agent of the defendant company, however, according to the custom of the road, a custom alleged to be merely for the convenience of

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travelers, took up the check held from the Pennsylvania Railroad and issued a Southern check to the plaintiffs, agreeing to forward the trunk when it arrived. Some days afterwards the trunk arrived in Washington, bearing a check corresponding to that taken up by the Southern's agent from Mr. Park. It, according to the testimony of the defendant, was immediately sent to him; but he refused to accept it, alleging it not to be his. The lost trunk not having been found, this suit was begun. The defendant, alleging that the trunk had never come into its possession, denied any liability on its part. The case came on for trial at the November, 1906, term of court for Greenville county, before Judge Watts and a jury. At the conclusion of plaintiffs' testimony a motion was made by the defendant for a nonsuit on the grounds: (1) That there was absolutely no proof going to show that the trunk had ever been delivered to the defendant; and, (2) that the complaint alleged the trunk to be the joint property of the plaintiffs, while the evidence showed that part of the articles belonged to one of the plaintiffs and part to the other. The motion was refused, and the jury rendered a verdict in favor of the plaintiffs for \$185. On motion for a new trial the verdict was cut down to \$176.50, the value placed upon the goods lost by the plaintiffs. The defendant appeals.

The question made is one of grave importance and much difficulty. The circuit judge, in overruling the first ground for the nonsuit, held that by taking up the check issued by the Pennsylvania Railway and issuing its check instead the Southern Railway became the agent of the Pennsylvania Railway, and was responsible for any neglect on the part of that road; that they took up the check at their peril, and left the plaintiffs in a worse fix than they found them. Such a doctrine, to say the least of it, is a hard one. When we bear in mind that there was no joint contract between these roads to carry plaintiffs and their baggage from Greenville to New York and return, and when we remember that there were two distinct tickets bought, namely, from Greenville to Washington and return, and from Washington to New York and return, we think it hardly going too far to say that such a doctrine would be unjust. There is no law in existence by which a railroad company can be held responsible for baggage which is shown never to have been delivered to it. Even in cases of through shipments of freight under joint contract a connecting carrier is allowed to relieve itself from liability by showing that the goods in question never reached its line, unless under contract it make itself absolutely liable. How much more, then, should the defendant in this case, where there were three distinct shipments, be allowed to show that the goods for which it issued its check as an accommodation never arrived, or that it exercised due care in delivering the baggage that did arrive bearing a check corresponding to that surrendered by the plaintiffs. Having shown either alternative, we think both reason and authority will sustain us in holding the defendant relieved of liability.

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The evidence of delivery relied on in this case is the check issued by the defendant company. Now it will doubtless be conceded that a check is a mere receipt for goods delivered. It can be no contract, for there are no words written thereon making a contract. The contract of carriage is either parol or is contained in the ticket held by the passenger. It has been held that even the ordinary ticket does not constitute a contract of carriage, but is merely *prima facie* evidence of the possessor's right to transportation. *Pier v. Finch*, 24 Barb. (N. Y.) 514. The general rule seems well settled that a receipt is merely *prima facie* evidence of the thing receipted for. *Hogg v. Brown*, 2 Brev. (S. C.) 223; *Gibson v. Peeples*, 2 McC. (S. C.) 418; *Daniels v. Moses*, 12 S. C. 130; *Brice v. Hamilton*, 12 S. C. 32; *Bowen v. Humphreys*, 24 S. C. 456. Now, unless, there is some matter of public policy making it advisable or necessary to make an exception in the case of receipts of common carriers, the rule will apply in the case now under consideration. That there cannot be such necessity for the exception seems settled by the number of authorities holding that such receipts are merely *prima facie* evidence, a few of which are 4 Elliott, § 1655; 3 Hutch. on Carriers (2d Ed.) §§ 1301, 1302; *Davis v. Railway*, 22 Ill. 278, 74 Am. Dec. 151; *Ahlbeck v. Railway*, 39 Minn. 424, 40 N. W. 364, 12 Am. St. Rep. 661; *Zeigler Bros. v. Railway*, 87 Miss. 367, 39 So. 811; 7 Current Law, 603.

Plaintiffs, relying on *Dill v. Railway*, 7 Rich. (S. C.) 162, 62 Am. Dec. 407, and *Salley v. Seaboard, etc., Ry.*, 76 S. C. 173, 56 S. E. 782, seek to show that the law is settled to the contrary in this state. The case of *Dill v. Railway* holds only that a check is evidence of delivery. That there is a distinction between the ordinary check and bill of lading seems evident. True, the responsibility of carriers of baggage is that of common carriers. The check issued by them, however, is merely a receipt for the baggage received, while a bill of lading, in addition to being a receipt, contains the contract under which the goods are to be carried. This conception distinguishes this and the case of *Salley v. Railway, supra*. In that case there was a joint contract of carriage, the railroad company issuing the bill of lading expressly making itself liable for the property, while here a receipt merely was issued, and according to the evidence a parol contract was made by which the defendant was to forward such goods as arrived over the Pennsylvania Railway bearing a check corresponding to the one surrendered by the plaintiffs. As was said above, there was no duty resting upon the defendant to issue its check to the plaintiffs. It could lawfully have refused such check until the baggage was actually delivered to it. In order, however, to save the expense and delay incident to passengers waiting on baggage, merely as an advantage to passengers, it is a custom of the defendant to exchange checks and forward the baggage when it arrives. Certainly, in making such a contract, the plaintiff being aware that his baggage is not in the custody of the

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defendant, it could hardly be presumed that it was in the contemplation of the parties that the defendant meant to make itself absolutely liable. Rather the presumption in the mind of the passenger would be that the defendant could not be held liable unless it was made to appear that the goods were actually received by it. Hence, if the evidence in this case is susceptible only of the inference that the defendant never received the goods in question, then it cannot be held responsible for them. To hold otherwise would be to make a contract between the parties which it was clearly their intention not to make, and would impose a liability upon the defendant which it was not its purpose to undertake.

Should the nonsuit, then, have been granted on this ground? We think not. The check issued by the defendant and introduced in evidence by the plaintiffs was certainly some testimony going to show delivery of the baggage in question to the defendant. There is nothing in this view conflicting with the order of Judge Purdy on demurrer, requiring an allegation of delivery to be made in the complaint. An allegation that the plaintiffs hold the check of the defendant was only an allegation of evidence going to show the fact of delivery. One of the fundamental rules of pleading is that the material facts must be stated in the complaint, while matters of evidence going to sustain such facts are properly brought out at the trial. Where, then, evidence is set forth and a material allegation is omitted, then, of course, there is a defect in the pleading. Again we ask, is the *prima facie* showing made by the check rebutted by the testimony of the plaintiff? As to immediate delivery it can hardly be doubted, but one would hardly suppose that a railroad company would issue its check, unless there was a combination of circumstances making a delivery at one time or another practically certain. The check is issued in contemplation of these circumstances. The presumption of delivery arising therefrom is so strong that it can only be rebutted by direct proof on the part of the defendant that the baggage was never received by it. The check in such cases continues to be a *prima facie* showing, which showing the railroad company must overcome. Hence the nonsuit on this ground was properly refused.

The second ground of the nonsuit must also be overruled. Were the action one of tort, the appellant's contention would be correct. *Hellams v. Switzer*, 24 S. C. 39. The action here, however, is *ex contractu*, and, according to section 138 of the Code of Civil Procedure of 1902, all parties interested in the contract must be joined as parties. This was likewise the general rule prior to the adoption of the Code. In *Ellis v. McLemore*, 1 Bailey (S. C.) 13, it is said the general rule is that all must join in the action who have an interest in the contract. The same rule is laid down in the *Ency. of P. & P.* vol. 15, p. 528, and many authorities are there collated sustaining the proposition.

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What has been said, we think, entirely disposes of all the exceptions raised. In our view of the law it was error on the part of the circuit judge to hold the defendant responsible for the baggage even though it was shown that it never came into its hands. Therefore the judgment below must be reversed.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

LITTLE ROCK RY. & ELECTRIC CO. v. GOERNER.

(Supreme Court of Arkansas, July 23, 1906.)

[95 S. W. Rep. 1007.]

Appeal—Admission of Evidence—Objection and Exception.—The admission of evidence cannot be reviewed; objection not having been made and exception saved at the trial.

Carriers—Passengers.*—One who pays his fare on a street car, and receives a transfer punched as of an earlier hour than it should be, and boards another car within the life of the transfer if properly punched, though after it has on its face become void, is a passenger.

Same—Ejection—Defective Transfer—Damages.—Where one boards a street car with a transfer, which he had received on another car where he had paid his fare, and which should have been punched to show him entitled to a ride at the time he boarded the second car, but which was in fact punched so as on its face to show it was presented too late, the conductor may expel him, using no more force than necessary, on his refusing to pay fare, and the company will be liable only for breach of contract; but where without fault of the passenger the conductor calls him a deadbeat, and assaults him there is a tort making the company liable not only for actual, but for punitive, damages.

Same—Duty to Passengers—Instructions.—An instruction that if plaintiff was a passenger on defendant's street car he was entitled to courteous treatment at the hands of the conductor, and if, without fault on his part, he was not treated with care and courtesy, he was entitled to recover, is erroneous in leaving it to the jury to say what would be courteous treatment.

Appeal—Harmless Error—Instructions.—Error in an instruction

*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *McDonald v. Central R. Co. (N. J.)*, 19 R. R. R. 58, 42 Am. & Eng. R. Cas., N. S., 58; *Chicago Union Traction Co. v. O'Brien (Ill.)*, 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95; *Robertson v. Boston & N. St. Ry. Co. (Mass.)*, 19 R. R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123; foot-notes appended to *Chicago, etc., R. Co. v. Troyee (Neb.)*, 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350; *Illinois Cent. R. Co. v. Proctor (Ky.)*, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531; foot-notes appended to *Chicago & A. R. Co. v. Walker (Ill.)*, 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596.

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that if plaintiff was a passenger he was entitled to courteous treatment from the conductor, in leaving it to the jury to determine what courtesy was due him, is harmless, it being conceded that if he was a passenger the conduct of the conductor towards him would make the company liable.

Trial—Abstract Instructions.—Where, in an action against a street railway company for ejection of plaintiff from one of defendant's cars by its conductor, the only contention of plaintiff was that he had paid his fare on another car, and received a transfer which should have shown him entitled to ride on the car from which he was ejected at the time it was presented, but which by fault of the conductor of the first car was punched so as on its face to show that it was presented too late, in which case he would still be a passenger, and there was no proof that he intended to pay his fare if the transfer was invalid, but the undisputed evidence was that he was not going to pay another fare, and the contention of defendant, supported by proof, was that plaintiff had not paid his fare, and had not received a transfer which he presented at the proper time, but that he was attempting to defraud defendant by offering and claiming the right to ride on a spent or bogus transfer, it was abstract and prejudicial to instruct that if plaintiff boarded the car with a transfer, which he believed valid, but which turned out to be void, he was a passenger "if he intended to pay his fare," and to modify defendant's requested instruction that if when plaintiff boarded the car he knew the transfer was invalid because stale, but intended to use it, he was not a passenger, by adding the condition "if plaintiff did not intend to pay his fare in any other way."

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by O. C. Goerner against the Little Rock Railway & Electric Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

The appellee alleged that on September 3d he boarded and paid his fare on a car of appellant going north on Main street, which was bound for East Markham street, and obtained a transfer to a West Markham street car; that the conductor of said west-bound car took up his transfer ticket, and, without fault of plaintiff, called him a deadbeat, and struck him over the eye with some instrument, inflicting severe wounds on his head and face, and pushed and pressed him back upon the railing of the car, inflicting wounds on his back and shoulders; that the transfer ticket was presented within the proper time, and the conductor was in the line of his employment at the time he committed the assault and battery upon the plaintiff. He prayed for judgment in the sum of \$1,500. The appellant denied that plaintiff became a passenger on its west-bound car, and that its conductor took up his transfer ticket, and then, without fault of his, called him a deadbeat and struck him over the eye; denied that the transfer ticket was presented within the proper time, and

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that plaintiff was entitled to ride thereon; and, further answering, alleged that, if there was any difficulty between plaintiff and its conductor, such difficulty was provoked by abusive language and insulting conduct toward the conductor. The appellee testified in substance that he boarded one of appellant's East Markham street cars between Sixth and Seventh on Main street; that the car was going north; that he paid his fare, called for and received a transfer to Pulaski Heights; that at Main and Markham he boarded a Pulaski Heights car immediately after debarking from the car on which he was riding. The conductor was the same who on a previous occasion had compelled appellee and his wife to get off the car. He took up appellee's transfer and asked him if he got his transfer the other night. Appellee answered in the affirmative, whereupon the conductor called him "a liar and deadbeat," and pounded appellee with a "billet" inflicting upon him painful injuries in his eye, back, and shoulder. W. H. Rankin, a justice of the peace, testified that there was a trial or investigation of the conductor before him, and that Mr. Loughborough, one of the attorneys for the street-car company, represented the conductor. The testimony on behalf of the appellant tended to show that the fight between the conductor and Goerner was brought on by the latter; that he presented a transfer ticket to the conductor at 10:30 o'clock that was issued at 9 o'clock. The transfer ticket was therefore an hour and a half late, and void under the rules of the company, according to the testimony on behalf of appellant. There was testimony also tending to prove that the transfer ticket was from a fifteenth street car, instead of an East Markham, as claimed by appellee. There was testimony that appellee had boarded the same car at the same place two or three times before that, and presented transfers that were late, which the conductor refused to accept. When the conductor called appellee's attention to these things, he said he was not going to pay another fare. Thereupon the conductor said to him: "It looks to me like you are trying to beat anyway." Then appellee "grabbed" the conductor by the throat, and the latter struck appellee one blow "to protect himself." Such was substantially the testimony of the conductor. He contradicted the testimony of appellee in every material statement, and the testimony of the conductor was corroborated by other witnesses who were on the car at the time and also by the motorman.

The court gave at the request of appellee the following instructions: "(1) If you find from the evidence that plaintiff took a car of the defendant on Main street, paid his fare, and obtained a transfer ticket from the conductor on said car, and took a Pulaski Heights car intending to present said ticket to the conductor of said Pulaski Heights car, the plaintiff became a passenger on said car, and was entitled to courteous treatment at the hands of said conductor, and if you find that he was, without fault on his part, not treated with care and courtesy, you will find for the plaintiff. (2) You are instructed that if you

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find for the plaintiff, you may find for him in such a sum as in your judgment will compensate him for pain and suffering, humiliation, and loss of time which you may find he sustained by reason of said injury. (3) You are instructed that if you find from the evidence that the conductor willfully and wrongfully struck and injured plaintiff, you may find by way of punishment in addition to any actual damages sustained, if you find any actual damages were sustained, such additional damages by way of punishment as in your judgment will deter others from like conduct again. (4) If you find from the evidence that plaintiff boarded a car with a transfer, which he believed to be good and valid, you will find for the plaintiff on this point, although you may find as a matter of fact said transfer ticket was invalid unless you further find that plaintiff did not intend to pay fare."

The court also gave the following: "If you find from the evidence that the transfer ticket which plaintiff presented to the conductor of defendant was received by plaintiff previous to or at the hour shown by the punch mark on said ticket, and that plaintiff did not present it for payment of his passage on the first Pulaski Heights car passing Markham and Main after he left the other car, then the court instructs you that the transfer ticket was invalid and the conductor was not obliged to receive it. And if you further find that at the time plaintiff boarded the Pulaski Heights car he knew that the transfer ticket was invalid because it was stale, but that he boarded said car intending to use it for his passage, [not intending to pay his fare any other way], then the relation of carrier and passenger did not exist between plaintiff and defendant, and [if conductor and plaintiff engaged in an independent fight] railway company is not liable." The words in brackets represent the modification which the court made to the request as it was asked by appellant. The court refused the request as presented, but modified and gave it in the manner indicated. Appellant objected to the ruling of the court in refusing its request as offered, and in making the modification.

In his opening argument to the jury counsel for appellee used the following language: "Mrs. Goerner was a passenger on that car and gave up one of these transfers; but she being the wife of the plaintiff in this case, and the law being that the wife cannot testify for or against her husband, her mouth is sealed. We cannot hear anything from her. Usually a woman makes a good witness. She is quick to see and notice details. It makes a deeper impression on her than anybody else." And in his closing argument counsel for appellee made use of the following: "Now the conductor is not in the employ of the street car company any more, and you noticed when I asked, 'What were you discharged for?' they said, 'Oh, we object,' and I did not get to show, and could not show, why he got out." Objections were made by appellant to the above remarks at the time, and the court was asked to exclude same from the jury. The court refused, and appellant saved its exceptions to the court's ruling. The verdict

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was for \$160. Judgment was entered accordingly, which this appeal seeks to reverse.

Rose, Hemingway, Cantrell & Loughborough, for appellant.
J. H. Carmichael, for appellee.

- Wood, J., (after stating the facts). First. No objection was made and exception saved at the trial to the portion of the testimony of W. H. Rankin, which appellant now urges as error. We will therefore not consider that question.

Second. A street railway may make and enforce reasonable rules to facilitate its business, and to protect itself from fraud and imposition. So long as these rules are not inconsistent with the rights of the public to transportation over the company's road, and do not impose unnecessary and unreasonable burdens upon them, they will be enforced. Booth, Street Ry. Law, § 237; Nellis. Street Surface Railroads, p. 440, § 8; Clark's Accident Law, § 81. A rule requiring transfer tickets showing the right of passengers who pay a single fare to ride upon the different cars and to various points on the company's road is reasonable. Where a passenger on a street car pays his fare, and calls for and receives a transfer ticket, which is void upon its face, and which is refused when presented to another conductor, he, nevertheless, had a valid contract with the company to be carried to his place of destination, and the company in expelling him from its car for a refusal to pay additional fare violates its contract, and is liable in damages for its breach. Thus far there is practical unanimity in the adjudications. But as to the measure of damages for such breach, and whether the action shall sound in tort for wrongful expulsion or be confined solely to one *ex contractu* there is great diversity of opinion. See Clark's Accident Law, § 83, p. 196, and O'Rourke v. Street Ry. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639, where the authorities pro and con are cited and reviewed. Mr. Freeman in his exhaustive notes to Commonwealth v. Power, 41 Am. Dec. 465 (7 Metc. [Mass.] 596), states the rule upon the subject as to commercial railways as follows: "If, by a mistake of one of the officers of the company, he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right, nevertheless, remains, and if for want of the requisite evidence of that right another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. But as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of heaping up damages. He should either pay the fare demanded or quit the train; and in either case we think he ought to recover as a part of his damages reasonable compensation for the indignity put upon him by the company through

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the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected being reasonable is a complete protection to the company and its servants against the recovery of any damages directly or indirectly, for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used." This rule is equally applicable to street railways, and is, we believe, based upon better reason than those authorities which hold to a different view. Judge Taft in *Pouillin v. Canadian Pac. Ry. Co.*, 52 Fed. 197, 3 C. C. A. 23, says: "The law settled by the great weight of authority is that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company. The reason for this is found in the impossibility of operating railways on any other principle, with a due regard to the convenience and safety of the rest of the traveling public, or the proper security of the company in collecting fares. The conductor cannot decide from the statement of the passenger what his verbal contract with the ticket agent was in the absence of the counter evidence of the agent. To do so would take more time than a conductor can spare in the proper and safe discharge of his manifold and important duties, and it would render the company constantly subject to fraud and consequent loss. The passenger must submit to the inconvenience of either paying his fare or ejection, and rely upon his remedy in damages against the company for the negligent mistake of the ticket agent." See, also, for a cogent statement of the reasons for the rule, *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481.

The strongest cases we have read, to wit, *O'Rourke v. Citizens' St. Ry. Co.*, *supra*, and *Lawshe v. Tacoma Ry. & Power Co.*, 29 Wash. 682, 70 Pac. 118, 59 L. R. A. 350, holding that under circumstances similar to the case at bar, the passenger may refuse to pay his fare, suffer ejection, and then sue the railway company for the wrongful expulsion, are not in conflict with the rule we have announced as to the liability of the railway company. They differ only as to the nature of the action, and the consequent measure of damages. It follows that under either rule the appellee was a passenger at the time of the alleged assault upon him. Under the rule we have announced, had there been nothing more than a refusal to accept the transfer ticket, a demand for additional fare and upon refusal an expulsion without using more force than necessary to accomplish the purpose, the railway company would have been liable only for a breach of its contract. But under the allegations of the complaint and the testimony on behalf of appellee, there was a willful breach of the contract, under such circumstances of insult and aggravation as to constitute a tort. *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967. These allegations if true would render appellant liable, not only for actual and compensatory, but also for punitive damages. While we do not find the first instruction obnoxious to

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the particular objections urged against it in brief of counsel, the latter portion of it was erroneous. It told the jury that if appellee became a passenger he "was entitled to courteous treatment," and if he was without fault, and "not treated with care and courtesy," he was entitled to recover. The court should have defined the duty of appellant to appellee to use ordinary care to protect him, if he became a passenger, from insults and injuries, and should have told the jury that in case appellee was a passenger if the conduct of appellant's conductor towards him as alleged in the complaint was established by the evidence, that it would render appellant liable. The instruction allowed the jury to generalize and speculate as to what would be "courteous treatment" and left them to say what "care and courtesy" was due from appellant to appellee. That is too uncertain. Jurors might differ greatly in their ideas of what would be "courteous treatment." The law fixes the standard and defines the measure of appellant's duty in such cases. The learned counsel for appellant has made no criticism of the instruction upon this ground. He seems to concede that if appellee was a passenger, (which the jury found), the conduct of the conductor towards him would render appellant liable and this is true, for if appellee was a passenger, the conductor had no right to insult him by saying as he says he did: "It looks to me like you are trying to beat any way." Therefore, we will treat the error pointed out as nonprejudicial; but we call attention to it so that a correct declaration may be given upon a new trial. The cause must be reversed for an error hereafter indicated.

There was no error in the second and third instructions given at the request of appellee. In the fourth the meaning is not clearly expressed, but it, doubtless, intended to tell the jury that if appellee boarded appellant's car with a transfer ticket which he believed to be valid, but which as a matter of fact turned out to be void, that he would still be a passenger if he intended to pay his fare. The instruction was abstract and prejudicial. There was no proof that appellee intended to pay his fare, if the transfer ticket was invalid. On the contrary, the undisputed evidence is that he "was not going to pay another fare." Under the rule we have announced *supra* appellee was a passenger if he had paid his fare which entitled him to a proper transfer ticket, even though the ticket given him was invalid, provided he presented such transfer ticket in proper time, and on the proper car. He was a passenger under such circumstances whether he intended to pay an additional fare or not in case the transfer ticket given him was refused. The only contention of appellant, in the lower court, as shown by the pleadings and proof, was that he had paid his fare and had received a transfer ticket which he presented at the proper time and on the proper car, and that this established between him and appellant the relation of passenger and carrier which entitled him to recover for injuries alleged. On the other hand, it was the contention of appellant that appellee had

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not paid his fare, and had not received a transfer ticket which he presented at the proper time and place, but that appellee was attempting to defraud the company by offering and claiming the right to ride on a spent or bogus transfer ticket, and appellant adduced evidence tending to prove its contention. Appellant was therefore entitled to an instruction presenting this theory to the jury. The court was asked to give such an instruction in appellant's request No. 8. But the court refused it as asked, and modified it by allowing the jury to find that if appellee had not paid his fare in the manner indicated in his complaint and proof, that he might have intended to pay it in some other way. This was not only without evidence to support it, but as we have shown there was positive and undisputed evidence to the contrary. Appellant's request for instruction No. 8 was correct as asked, and should have been granted without modification.

Third. The remarks of counsel for appellee both in the opening and closing argument was an effort to place before the jury as evidence indirectly by argument that which could not be produced directly in the proof. The remarks were highly improper. But inasmuch as the cause must be reversed for the errors indicated in the instructions, it is unnecessary to determine whether or not the remarks constituted reversible error. It is safe to assume they will not be repeated.

Reversed, and remanded for new trial.

HILL, C. J., not participating.

PITTSBURG, C., C. & St. L. R. Co. v. AMERICAN TOBACCO Co.

(Court of Appeals of Kentucky, Oct. 10, 1907.)

[104 S. W. Rep. 377.]

Carriers—Loss of Goods—Delivery to Carrier.*—A carrier's liability as insurer for a loss of goods begins when the carrier has actually received the goods as a carrier for immediate shipment.

Same—Bill of Lading—Scope.†—A bill of lading issued by a carrier is only prima facie evidence of the receipt of the goods described in it, being open to explanation, and imposing no liability on the carrier as an insurer until the goods are actually received by the carrier.

Same—Evidence of Delivery.—Evidence held to show that tobacco was delivered to a carrier for transportation before its destruction by fire, so as to charge the carrier as an insurer with liability for its loss, though no notice was given to the carrier after the loading had been completed.

Same—Delivery to and Acceptance by Carrier.*—When goods designed for immediate shipment are placed in a condition to be carried, in the usual place of loading, in accordance with the custom of dealing between the parties, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, there is both a delivery to and an acceptance by the carrier.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by American Tobacco Company against Pittsburg. Cincinnati, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Gibson, for appellant.

Augustus E. Willson and *Arthur E. Hopkins*, for appellee.

O'REAR, C. J. Appellee had certain hogsheads of tobacco stored at the warerooms of the Union Warehouse Company in

*See foot-notes appended to *Nelson v. Chicago, etc., Ry. Co.* (Neb.), 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613; foot-notes appended to *Chicago, etc., R. Co. v. Powers* (Neb.), 13 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286; second head-note appended to *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 322, 32 Am. & Eng. R. Cas., N. S., 332, where all the preceding authorities in this series on the subject are collected.

†For the authorities in this series on the question whether a bill of lading is conclusive evidence as to matters stated therein, see foot-notes appended to *Roy & Roy v. Northern Pac. Ry. Co.* (Wash.), 20 R. R. R. 739, 43 Am. & Eng. R. Cas., N. S., 739; *Henderson v. Louisville & N. R. Co.* (La.), 20 R. R. R. 644, 43 Am. & Eng. R. Cas., N. S., 644; foot-notes appended to *Swedish-American Nat. Bank v. Chicago, etc., Ry. Co.* (Minn.), 19 R. R. R. 783, 42 Am. & Eng. R. Cas., N. S., 783, where all the preceding authorities on the subject are collected.

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Louisville. A private railroad switch, not owned nor controlled by appellant, extended alongside the warehouse. Appellee notified appellant of its desire to ship the tobacco over appellant's line of road from Louisville to Chicago, and requested that a car for the purpose be placed on the siding at the warehouse to receive it. Appellant placed the car as requested. The warehouse company was notified by appellee to load the tobacco. After the car was placed, the warehouse company put the tobacco on the platform of its warehouse alongside the car, for the purpose of loading it as soon as its laborers could conveniently attend to it. Appellee was notified that the tobacco was loaded, whereupon it prepared a bill of lading in the customary form and presented it to appellant's city office for signature. Appellant signed the bill of lading between 12 o'clock noon and 1 o'clock p. m. of that day, which was about one hour in advance of the actual loading of the tobacco. The tobacco was loaded about half past 1 or 2 o'clock of that day, and the car was sealed ready for transportation. The fact is the siding was under the control of the Kentucky & Indiana Railroad & Bridge Company, a distinct corporation, which transferred cars between different points in the city of Louisville and across the Ohio river by means of its own tracks and bridge in connection with the tracks of connecting railroads. About 4 o'clock p. m. on the day on which the tobacco was loaded, and before the car was removed, a fire occurred in the neighborhood, which extended to the warehouse property and burned the car. The tobacco was entirely destroyed, or so materially damaged as that it was worthless. In this suit by the shipper against the carrier, who had undertaken to carry the tobacco, to recover for its loss, the question for decision was whether there had been such a delivery to the carrier as that its responsibility as an insurer of the freight attached. The facts were not disputed. Whereupon the court peremptorily instructed the jury to find for the shipper.

A bill of lading issued by a common carrier is only prima facie evidence of the result of the goods described in it. It is open in explanation, and imposes no liability on the carrier as an insurer, unless the goods are actually delivered. Elliott on Railroads, § 1419; Hutchinson on Carriers, §§ 121-123. If the fact had been that the goods had been destroyed by fire before they were actually delivered to the carrier, as, for example, in this case, while they were still on the platform of the warehouse, the carrier would not have been liable as an insurer, notwithstanding its receipts evidenced by the bill of lading. Its liability depends upon the fact as to whether it has actually received the goods as a carrier for immediate shipment. Appellant contends that the goods were not in its custody until they had reached its own line of road, or in no event until the goods had been loaded upon its car ready for shipment and it had been notified of the fact. Railroad v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, Basnight v. Railroad Co., 111 N. C. 592, 16 S. C., 323, and Tate

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v. Railroad Co., 78 Miss. 85, 29 South. 392, 84 Am. St. Rep. 649, are relied upon. We do not deem it material that appellant did not own nor control the siding where it had placed the car to receive the tobacco. It had assumed to receive it at that point, and had caused its car to be placed there for that purpose. It thereby constituted the warehouse side track the place for the reception of the freight, and is bound by the fact, so much so as if it had been upon its own siding or at its regular freight station in the city. Certain kinds of freight can be conveniently loaded only at points not freight depots. Where the parties adopt such point as the proper place for the loading of such freight, and the goods are actually loaded onto the cars placed at that point by the carrier for that purpose, the result, as fixing the carrier's liability upon its contract to safely carry and deliver the goods, is nowise different from what it would be if it had received the goods into its freight depot for the same purpose. Indeed the receiving of the goods into the freight depot is not essential to fixing the carrier's liability at all. It is the receipts at any point for the purpose of carrying them as freight that initiates the liability for their safety. If the carrier and its shippers agree expressly, or tacitly by custom, that the goods be delivered to the carrier in its cars upon private sidings, the carrier, after so receiving them, has them in possession for transmission as freight. The Kentucky & Indiana Bridge Company in this case is deemed the agent of appellant carrier for the purpose of receiving the goods and hauling them to appellant's own line of railroad.

Nor do we find merit in appellant's contention that it was not notified of the loading of the tobacco after it was loaded. It was notified of the shippers purpose to load it at the warehouse, and placed its car there to receive it. It signed the bill of lading evidencing its receipt, which was on itself notice that the car had been or was being loaded. When the car was loaded and sealed, a further notice of that fact was not necessary to apprise the carrier of what it already knew, namely, that it was ready for shipment; for notice might be given in advance, or might even be waived. When the tobacco was actually delivered into the carrier's car in accordance with the bill of lading, its physical delivery to the carrier for the purpose of transportation was completed. The *prima facie* character of the bill of lading became absolute upon proof of the subsequent actual delivery in accordance with its terms; the delivery being in such close proximity to the issuing of the bill as to be for all practical purposes a part of a single transaction. The doctrine that an acceptance by the carrier is essential to the creation of its contract liability is sound and undisputed. It would be most unjust if the shipper could deposit his goods in the carrier's car without notice to the latter, and fix a heavy liability upon it as an absolute insurer, while it was ignorant of the fact that it was expected to take charge of the goods for shipment. But the acceptance need not always be shown to have been by an express act. It may be presumed,

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when the goods are left in the usual place in accordance with the contract or custom of the carrier to so receive them. Hale on Carriers, 68. The cases relied on by appellant, while bearing many of the features of the one in hand, show that control over the goods had not been parted with by the shipper, or that something else was to be done by the carrier before the shipment was to begin, such as the counting or weighing of the goods. But, when goods, are designed for immediate shipment, the placing them in a condition to be carried at the usual place of loading, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, constitutes a delivery to the carrier and acceptance by it. Railroad Co. *v.* Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674; Railroad Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

It was shown in the case that the custom of dealing between the parties was followed. The goods were delivered in the same manner, at the same or similar place. The bill of lading was signed simultaneously or in advance of the loading. The previous custom had been for the carrier, without further notice, to have the car transported to its own line by the bridge company's locomotives and servants in the usual course of their business. The plan usually followed was probably a feature and incident of the conditions existing in cities of the size of Louisville, where a number of railroads center, having different warehouses and depots, and where there are many manufacturing plants and public warehouses situated upon private sidings. The practice is a practical and reasonable solution of the needs of the situation, worked out by the common sense of those dealing in such matters. There appears every reason for fixing the carrier's liability to begin at the usual or actual place of its receiving consignments of freight, as though they were received at the carrier's own depot, and presuming its acceptance from its custom and knowledge of the particular transaction, while no just reason is advanced to the contrary.

The action of the circuit court and its judgment being in conformity to these views, the judgment is affirmed.

GOODIN & GOODIN v. SOUTHERN RY. CO.

(Supreme Court of Georgia, May 24, 1906.)

[54 S. E. Rep. 720.]

Carriers—Delay in Delivery—Damages—Direct or Remote Consequences.*—Allegations of loss of profits which would have accrued to plaintiffs upon the fulfillment of a collateral contract in consequence of the delay on the part of a common carrier in the delivery of freight are properly stricken upon demurrer, where it does not appear that the contract, from the fulfillment of which profits would have accrued, was in the contemplation of the parties at the time the carrier received the freight for transportation.

Same—Charges—Rights of Connecting Carriers—Delivery to Consignee—Delay.†—And where the agent of the defendant company (a terminal carrier) at the station to which such freight is carried demands a sum as freight greater than that fixed in the bill of lading issued by the initial carrier, and in consequence of the consignee's refusal to pay more than the latter sum the shipment is not delivered for a period of 10 days, the last carrier is not liable in damages to the consignee on account of such delay, even though at the expiration of the time named the goods are delivered upon the payment of the amount of freight set out in the bill of lading, where it does not appear that the amount demanded by the defendant's agent was in excess of the legal and proper charges according to the fixed and usual rates, nor that there existed between the defendant company and the initial carrier contractual relations with reference to transportation charges.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Goodin & Goodin against the Southern Railway Company. From a judgment in favor of defendant, plaintiffs bring error. Affirmed.

*See foot-note appended to *Western v. Boston & M. R. R.* (Mass.), 19 R. R. R. 718, 42 Am. & Eng. R. Cas., N. S., 718; foot-note appended to *Wesner & White Mfg. Co. v. Atlantic Coast Line R. R.* (S. Car.), 19 R. R. R. 342, 42 Am. & Eng. R. Cas., N. S., 342; *Wall v. Atlantic Coast Line R. R.* (S. Car.), 19 R. R. R. 332, 42 Am. & Eng. R. Cas., N. S., 332; foot-note appended to *Chicago, B. & Q. Ry. Co. v. Todd* (Neb.), 19 R. R. R. 113, 42 Am. & Eng. R. Cas., N. S., 113, *Bourland v. Choctaw, etc., Ry. Co.* (Tex.), 19 R. R. R. 61, 42 Am. & Eng. R. Cas., N. S., 61, foot-note appended to *Central of Georgia Ry. Co. v. Chicago Portrait Co.* (Ga.), 18 R. R. R. 85, 41 Am. & Eng. R. Cas., N. S., 85.

†For the authorities in this series on the question, what are the delays for which a carrier is liable, see foot-note appended to *General Fire Ext. Co. v. Carolina & N. W. Ry. Co.* (N. Car.), 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336, foot-note appended to *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 19 R. R. R. 76, 42 Am. & Eng. R. Cas., N. S., 76; *Alabama Great So. R. Co. v. Quarles & Conturie* (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69.

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Goodin & Goodin, sawmill operators, sued the Southern Railway Company for damages caused by delay in the delivery of certain sawmill machinery. The petition, as first amended, alleged that the defendant "is a railroad corporation in the possession of the Augusta Southern Railroad from Augusta to Sandersville, Ga., and said defendant was operating said Augusta Southern Railroad from Augusta to Sandersville, Ga., during the month of May, 1903;" that the plaintiffs purchased the machinery from a dealer in Atlanta, to be delivered at Gracewood, a station on the Augusta Southern Railroad; that the defendant received the machinery for transportation to Gracewood, and that the machinery was received at Gracewood May 9, 1903; that the plaintiff presented the original bill of lading to the agent of the defendant on the day the shipment arrived, and also tendered to him as freight the amount therein named, but that the defendant refused to deliver the machinery until a higher freight charge was paid than the rate named in the bill of lading, claiming that the waybill accompanying the shipment specified the higher rate; and that after a delay of some 10 or 12 days the machinery was delivered upon payment of the price named in the bill of lading. The plaintiffs alleged that by reason of the delay in the delivery of said machinery they were unable to fulfill a contract to saw a certain amount of lumber, and they asked as damages the amount they would have made, had they been able to perform the contract.

To this petition the defendant filed a general demurrer, upon the ground that the only damage alleged in the petition was loss of profits growing out of a collateral contract of which the defendant had no knowledge at the time the contract of freightage was made, and in that such profits are not recoverable in law. Before judgment was rendered on the demurrer, the plaintiffs, amended their petition by setting up as additional damage the expenses connected with the maintenance of their idle plant, whereupon the defendant demurred specially to that part of the petition which sought to recover profits growing out of the collateral contract. The special demurrer was sustained, and that part of the petition stricken, to which ruling the plaintiffs introduced evidence supporting the allegations that the machinery was received at destination upon the date named, and that it was held for 10 days on account of higher charges being demanded by the defendant than those stipulated in the bill of lading, and was finally delivered upon payment of the charges named in the contract; also testimony going to show that they were put to expense in maintaining an idle plant caused by this delay, that the Southern Railway Company operated the Augusta Southern Railroad during the month of May, 1903, and that Gracewood was a station upon the line of the Augusta Southern. On the conclusion of the plaintiff's evidence the court granted a nonsuit, to which the plaintiffs excepted.

F. W. Capers and *F. L. McMurray*, for plaintiffs in error.

Jos. B. & Bryan Cumming, for defendant in error.

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BECK, J. (after stating the facts). 1. There can be no doubt that the judge who tried the case below was right in sustaining the demurrer to that part of the petition which sought to recover the profits of a collateral contract between the plaintiffs and a third party; it not being alleged that the defendant company had notice of such contract at the time it undertook to transport the shipment. In the case of *Wappoo Mills v. Commercial Guano Co.*, 91 Ga. 396, 18 S. E. 308, this court held: "The purchaser of goods cannot recover of the seller damages for nondelivery measured by his profits on a particular contract of resale and by his losses on account of inability to perform that contract, unless the seller at the time of making the contract of sale had notice of such contract of resale." See, also, *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; 2 Sedg. Dam. 630; 8 Am. & Eng. Enc. L. (2d Ed.) 623, and citations.

2. It is undoubtedly the duty of a connecting carrier to deliver freight intrusted to its care, the destination of which is upon its line, within a reasonable time; and it is true that the violation of this duty gives rise to a right of action ex delicto for the damages resulting from such delay. *Johnson v. E. Tenn. Ry. Co.*, 90 Ga. 810, 17 S. E. 121. Yet it is equally clear that where such carrier receives the goods at the end of another carrier's line there being no contractual relations between the two roads with reference to transportation charges), and the latter neglects to inform the former of a special rate agreed upon in its contract of shipment with the consignor, but delivers to the connecting carrier a waybill calling for a different and higher rate than the charge named in the bill of lading issued to the consignor, the connecting carrier has the right to demand the charges named in the waybill before delivering the shipment to the consignee, where it does not appear that the amount specified in the waybill is not the usual rate. Such are the facts in this case. It is inferable from the record that the shipment was delivered to the Central of Georgia Railway Company at Atlanta, that that company issued to the consignor a bill of lading wherein it agreed that the shipment would be transported to the destination at a specified rate, and that it then transported and delivered the shipment, together with the waybill calling for the higher rate to the defendant at the junction point of the two companies. Under these circumstances the defendant had the right to demand the rate named in the waybill, there being neither allegation nor proof that there existed between the two companies contractual relations in regard to freight charges; and this position is amply supported. "Plaintiff made a contract with a railroad company for special through rates on a shipment of five mares. On the arrival at their destination on another line of railroad, plaintiff tendered the amount fixed by the contract and demanded delivery, which was refused unless a larger sum called for by the waybill was paid. Plaintiff then brought action against this railroad company for the recovery of the mares. *Held* that, plain-

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tiff having introduced no testimony to show that the initial road was authorized to make such special contract for the defendant, a nonsuit was properly granted." *Lewis v. Railroad Co.*, 25 S. C. 249. See, to the same effect, *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Mt. Pleasant Mfg. Co. v. R. Co.*, 106 N. C. 207, 10 S. E. 1046; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

The shipment in the case at bar was made under a "standard bill of lading," which contained recitals to the effect that the goods were shipped "released" and at a reduced rate, and that the initial carrier should not be held liable beyond its line. "Where the first of several connecting railway companies, while stipulating against liability beyond its own line, makes a guaranty that the cost of transportation to a distant point beyond its own route shall not exceed a certain sum less than the usual aggregate of charges, and this without any knowledge or notice of the guaranty by any of the connecting roads, and without their authority to give it, each succeeding company after the first may charge and pay preceding charges at the usual rates, and the last carrier or the final warehouseman will have a lien on the goods for the total amount accordingly; for the shipper's remedy is against the first carrier on the guaranty." *Schoul. Bail. & Car.* p. 630, § 610. See, also, *Hutch. Car.* § 478a. But now the question is suggested, did the defendant company, by accepting the shipment, become bound by the terms of the special contract, notwithstanding the fact that it was not a privy or party to the contract, and was in fact informed by the initial carrier, by means of the waybill, that a rate different from the amount stipulated in the contract had been charged? In the absence of an allegation that a copy of the bill of lading accompanied the shipment, or that the defendant had notice of its terms, or that the amount specified in the waybill was on its face an unusual and excessive charge, we think not. It is generally recognized in cases similar to this that the initial carrier is the agent, not of the succeeding carrier, but of the shipper (*Ga. R. Co. v. Murrah*, 85 Ga. 347, 11 S. E. 779); and where the initial road, acting in the scope of such agency, fails to inform the connecting carrier of a special contract of shipment made with it by the consignor, but leads the succeeding road to believe that the shipment is to be transported in consideration of the usual rate, we are constrained to believe that the connecting carrier is entitled in the usual rate, and is not bound by any secret rate agreement between the shipper and the first carrier. Although this question was not clearly made in the case of *Schneider v. Evans*, *supra*, both parties there having agreed that the connecting carrier "had no knowledge whatever" of the contract made with the initial carrier, yet the language of the judge who delivered the opinion in that case is pertinent here and applicable to the point now raised. He said (page 251 of 25 Wis. [3 Am. Rep. 561]); "It is a mere question, where the owner has taken a guaranty from the first carrier that the through rate

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shall not exceed a certain sum, whether the others, having no knowledge of it, are not entitled to act upon the general custom. It seems to me that they are, and that it is more reasonable to impose on the owner, who, knowing the custom [of carriers of paying back charges and charging the usual rates for transportation], causes the goods to be delivered to the carriers without notifying them of his secret contract, the burden of resorting to the company with which he contracted, than to impose on the carriers the burden of ascertaining at their peril all the secret agreements between the shipper and prior carriers from whom the goods are received, affecting their right to receive the ordinary freights." And again: "The custom under which these carriers acted is more for convenience of shippers than of carriers. It enables property to be transported over long routes, composed of many distinct companies and lines, with great safety and dispatch, and without the necessity of employing any intermediate agents other than the carriers themselves. If, therefore, the risk is to be imposed on each to ascertain at its peril whether there are any secret agreements affecting the liability of goods received in the ordinary course of business to the ordinary freights, this liability must result in breaking up the custom, and thus tend greatly to the public inconvenience." Nor is this principle new to our court; it being clearly recognized in the Murrah Case, *supra*, where it was said: "That the charges, if within the ordinary rates and apparently regular, are not cut down, nor the right to hold the goods defeated, by the mistake or omission of a previous independent carrier, of which the last carrier, without fault or negligence on his part, has no notice, see" numerous case and text-writers, among them being the case of Wells v. Thomas, *supra*. And in the case last cited (Wells v. Thomas) there was a bill of lading issued, naming a certain fixed rate for the through transportation, as in the case at bar; and, as was also done in the case under consideration, the amount stipulated in the bill of lading in the Wells Case was tendered to the terminal carrier, but the court there did not hesitate to say: "What may be the proper construction of the bill of lading forwarded to the plaintiffs here by the New York Central Railroad Company is not material to be determined. If the meaning of it be as intended by the plaintiffs, the New York Company is of course responsible; but this is no reason why defendants should lose their lien. If any arrangement or understanding existed among these corporations relative to through transportation, the rule would be different"—thus clearly showing that the contract with the initial carrier, to which the defendant was not a privy or party, had no possible bearing on the case. So it would seem clear that, had the defendant company in the present case held the shipment until the amount named in the waybill, or usual rate, was paid, the plaintiffs below would have had no right of action against it (there being no proof of any contractual relation existing be-

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tween the two carriers); our own court having held that, where there is no arrangement whereby two or more carriers are connected as common or joint contractors in the business of transportation; each conducting its business separately and independently of the other, neither has implied authority from the other to make contracts in its behalf as to the charges which will be made for the transportation of goods. *Ga. R. Co. v. Murrah, supra*. And this holding—that the mere acceptance of a shipment by a succeeding carrier is not an undertaking on its part to carry out the terms of a contract of shipment of which it has no knowledge, made between the consignor and initial carrier, when it is informed by the initial carrier that the shipment was made under the usual conditions—is not a death-blow to all “through contracts” of shipment, as may be contended. When the shipper chooses an initial carrier as his agent to see that goods reach their destination, and makes a binding contract with such carrier under the terms of which it agrees to guaranty the rate for the whole distance, a portion of which is beyond the carrier’s line, he is not without his remedy if a succeeding carrier, without knowledge of this contract, accepts the shipment and charges a higher rate. “If the first carrier has contracted for the rate for the entire transportation, and the charges exacted by connecting carriers are such as to render the entire charge greater than that contracted for, the remedy of the consignor or owner is against the carrier with whom the contract was made.” 6 Cyc. p. 495. “The plaintiff cannot therefore, in the absence of some agreement by the defendant to refund, recover of it the sum paid in excess of what the [initial carrier] agreed to ship the goods for; the remedy being to sue the [initial carrier] on the contract.” *Mt. Pleasant Mfg. Co. v. R. Co., supra*. See, also, *Railway Co. v. Daniels (Ark.)* 5 S. W. 584; *Schoul. Bail. & Car., supra*.

The defendant company did all that could be required of it as a public carrier when it transported the shipment promptly and safely to the destination, and there offered it for delivery upon payment of the charges specified in the waybill, there being no allegation that the defendant company did not use all proper care and diligence in ascertaining what the charges were when it accepted the shipment under the waybill, or that those charges were not the usual and lawful charges. If the charges demanded were beyond the lawful and usual charges, it should have been so alleged and proved. The case being a suit in tort for the alleged breach of duty, the plaintiffs are of necessity required to prove the tortious act before there can be a recovery; and this they have failed to do. Under no view of the case, as we see it, has the defendant failed to do its duty. It owed no public duty to the plaintiffs to deliver the goods until it had been paid its lawful charges for transporting them; and if the defendant had the right to hold the goods until its proper charges were paid, it certainly had the right to subsequently deliver the goods for

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a smaller charge unless prevented from so doing by law. Hence it follows that the judgment granting the nonsuit was the only one that could properly have been rendered under the facts and circumstances of this case.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent, and ATKINSON, J., not presiding.

MANGUM v. NORTH CAROLINA R. Co. et al.

(Supreme Court of North Carolina, Oct. 10, 1907.)

[58 S. W. Rep. 913.]

Carriers—Station Platform—Injury to Passenger—Liability.*—A railway company must keep its station premises in a reasonably safe condition for passengers, the duty extending to the manner in which a platform is allowed to be used, and a carrier is liable for injury to a passenger by the negligence of a newspaper porter while moving a truck along a platform with the carrier's consent; that the newspaper company may also be liable not relieving the carrier from its duty to furnish the passenger a safe passage to its train.

Appeal from Superior Court, Wake County; E. B. Jones, Judge.

Personal injury action by C. E. Mangum against the North Carolina Railroad Company and another. From a judgment for plaintiff, defendants appeal. No error.

Civil action tried at February term, 1907, of Wake superior court; his honor E. B. Jones, judge, presiding. These issues were submitted: (1) Was plaintiff injured by the negligence of the defendant as alleged in the complaint? Ans.: Yes. (2) Did plaintiff by his own negligence contribute to the injury complained of? Ans.: No. (3) What damage, if any, is plaintiff entitled to recover? Ans.: \$7,500. From a judgment rendered. defendants appealed.

F. H. Busbee and *A. B. Andrews, Jr.*, for appellants.
Chas. U. Harris, for appellee.

BROWN, J. The evidence tends to prove that the plaintiff, on the night of July 4, 1903, was a passenger on defendants' train en route from Raleigh to Danville, Va. He passed through the gates of the defendants' station at Raleigh, and as he was walking along the platform used by passengers to reach the cars he was run into and seriously injured by a truck loaded with newspapers. It was in evidence that the man in charge of the truck was not employed by the railroad, but was employed by a newspaper, and it was his business to handle the newspaper mail.

*See generally, extensive note, 2 R. R. R. 136, 25 Am. & Eng. R. Cas., N. S., 136.

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When the newspaper mail reaches the station in time, it is the custom for the railroad truck hands to take the mail from the gate down to the train. When the newspapers arrive too late to be taken at the gate by the truck hands, the man who brings the newspapers down from the office takes it down to the cars and delivers it to the mail agents at the mail car. Witness R. E. Lumsden testified that the newspaper mail was handled by the railroad porters when it got to the gates before the transfer clerk and the porters went down with the regular mail. If it arrived in time, the railroad porters took the mail down to the mail car; but, if the newspaper mail got to the gate after the porters had gone down with the mail, the person who brought the newspaper mail took it down to the mail car and unloaded it. When he went down with the mail on the night of July 4, 1903, the newspaper mail had not come. A colored boy named Lunsford Davis handled the newspaper mail to the depot for the newspaper at the time. The witness heard of the accident either that night or the next day.

The only question presented for our consideration is the liability of defendants to plaintiff for the negligence of the newspaper porter upon the above facts. It seems now to be almost elementary that one of the recognized duties of a railway company that undertakes to carry passengers is to keep its station premises in a reasonably safe condition so that those who patronize it may pass safely to and from the cars. *Pineus v. Railroad*, 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856; *Wood on Railways*, 310, 1341, 1349. This duty extends not only to the condition of the platform itself, whereon passengers walk to and from the trains, but also to the manner in which that platform is allowed by the common carrier to be used. *Weston v. Railroad Co.*, 73 N. Y. 595; *Wood, supra*. The defendants owed a duty to plaintiff and to all other passengers to keep its depot platforms used by them as means of ingress and egress free from obstructions and dangerous instrumentalities, especially at a time when its passengers are hurrying to and from its cars. *Pineus v. Railroad, supra*; *Railroad v. Johns*, 36 Kan. 769, 14 Pac. 237, 59 Am. Rep. 609.

The fact that the injury to plaintiff was inflicted by the negligence of the newspaper porter, who, with defendants' consent, was on his way from the gates to the mail car with the truck loaded with papers, does not relieve the defendants from their contractual obligation to plaintiff, and we find no authority which sustains the contention that it does. The liability does not arise because defendants might reasonably have anticipated just what happened, but grows out of their duty to plaintiff to furnish him reasonably safe passage to the train. The defendants are not bound to accept newspapers and deliver them to the mail car unless the newspaper company delivers its papers at the gates in reasonable time for the defendants, through their own agents and employees to take them at the gates and transport them to the mail car. If the defendants customarily permitted the newspaper porter, when late in his delivery, to push the truck along

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the platform inside the gates when passengers are hurrying to and fro, the defendants must be liable for the porter's negligent conduct while using the station platform, upon the principle that they have temporarily accepted him as their servant. *Railroad v. Gustafson*, 21 Colo. 393, 41 Pac. 505; *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528; *Hill v. Morey*, 26 Vt. 178; *Oil Creek v. Kreighton*, 74 Pa. 316; *Dimmitt v. Railroad*, 40 Mo. App. 654.

The fact that the newspaper company may also be liable for the negligence of its servant as a tort does not relieve the defendants from their contract obligations to furnish plaintiff a safe passage to its train. The case of *Fritz v. Railroad*, 132 N. C. 829, 44 S. E. 613, pressed upon our attention, has no relation, we think, to the case at bar. In that case plaintiff, while alighting from the train, was injured by another passenger who was attempting to make his way into the car and accidentally struck plaintiff on the knee with his valise. The court held in that case that such conduct on the part of the passenger could not reasonably have been anticipated by the company's agents. For the same reason, the case of *Muster v. Railway*, 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141, cited by defendants, is no authority, in our opinion, to sustain their contention. In that case a postal clerk negligently threw out a mail bag at an unusual place, where he had never before thrown it. The court held that the company could not anticipate such conduct, and therefore was not called upon to take precautionary measures to prevent injury. On the contrary, it is held, in *Snow v. Railway*, 136 Mass. 552, 49 Am. Rep. 40, that a passenger, waiting on a platform at the railroad station for a train and injured by a mail bag being thrown from a passing train, such throwing being customary and well known to the company, may recover of the railroad company therefor. The decision is put upon the ground that, although the postal clerk is not the agent of the railroad company, but is the agent of the national government exclusively, the custom being known to the company, it must take precautions to protect its passengers from injurious consequences.

It is true, as contended by counsel, that there is no proof whatever that defendants are under any contractual obligation or duty to receive the mail intended for the mail car at the station gates, when the newspaper is late in reaching the train. But if, nevertheless, they do receive the papers on such occasions, and customarily permit the newspaper porter to discharge the duty their hired employees otherwise discharge, they must be held to liability to passengers if they are injured by such porter's negligence while on the platform.

The only exception to the evidence was abandoned by appellants upon the argument. We have examined the charge carefully, and find it fair, free from error, and in line with the views expressed in this opinion.

No error.

COFFEY v. OMAHA & C. B. ST. RY. CO.
(Supreme Court of Nebraska, June 7, 1907.)

[112 N. W. Rep. 589.]

Carriers—Injury to Passengers—Contributory Negligence.*—It is a question of fact for the jury whether or not a passenger, who is riding on the lower step of a platform of a crowded street car, and who is thrown therefrom and injured by reason of the negligent operation of the car, is, by voluntarily riding in such place, guilty of such contributory negligence as will defeat a recovery.

Same—Question for Jury.—Evidence as to the negligence of the defendant in the operation of the car examined, and held sufficient to require its submission to the jury.

Evidence—Opinion Evidence.†—A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving. *Omaha St. Ry. Co. v. Larson*, 97 N. W. 824, 70 Neb. 591, followed and approved.

Same—Admissibility.—Rulings of the trial court on the admission and exclusion of testimony examined, and held not to be prejudicially erroneous.

Trial—Instructions.—It is not error to refuse instructions requested, where the substance of the instructions requested has been embodied in the court's charge to the jury.

Same.—Instructions given examined, and held to have been properly given.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Douglas County; Redick, Judge.

Action by John T. Coffey, administrator, against the Omaha & Council Bluffs Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John L. Webster, for appellant.

Weaver & Giller, for appellee.

GOOD, C. John F. Coffey, in his representative capacity as administrator of the estate of John Nelson, deceased, brought this action to recover damages for the death of said Nelson, and alleged that Nelson on the 11th day of October, 1903, was a passenger on one of defendant's street cars, and, while riding on the rear platform of the car, was thrown off and killed; that the

*See foot-notes appended to *Gaffney v. Union Traction Co.* (Pa.), 17 R. R. R. 661, 40 Am. & Eng. R. Cas., N. S., 661.

†See foot-notes appended to *Verrone v. Rhode Island Sub. Ry. Co.* (R. I.), 21 R. R. R. 685, 44 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to *Colorado & S. Ry. Co. v. Webb* (Colo.), 21 R. R. R. 72, 44 Am. & Eng. R. Cas., N. S. 72.

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employees and servants of the defendant in charge of said car negligently permitted the same to become crowded, and ran the same at a high rate of speed around a curve in the defendant's railway track, thereby causing the said car to give a sudden and violent lurch, which caused Nelson to be violently thrown from the car to the pavement, thereby causing his death. Defendant in its answer denied all negligence on its part, and alleged contributory negligence on the part of Nelson, and alleged that he was intoxicated at the time of his injury. There was a trial to a jury in the court below, resulting in a verdict of \$1,500 in favor of the plaintiff. The court overruled defendant's motion for a new trial and entered judgment on the verdict, from which defendant appeals to this court.

Defendant not only complains of the rulings of the trial court in the admission and exclusion of evidence and in the giving and refusing of instructions, but contends that the trial court should have directed a verdict for the defendant because Nelson came to his death solely from his own negligence. From the evidence it appears that Nelson boarded the car of the defendant at the intersection of Sixteenth and Dorcas streets to go north on Sixteenth street in the city of Omaha; that the car was somewhat crowded, the seats all being taken, perhaps some passengers standing in the aisle, and a number of passengers standing on the back platform; that Nelson took a position on the lower step of the rear platform and remained there until the accident; that two or three times the conductor of the car requested Nelson to step up and go inside, but did not warn him of any danger, the request to step inside being given apparently to clear the way for passengers to get off and on the car. The car continued northward until it reached a point between Williams street and Pierce street, where Sixteenth street widens, the added width being all on the east side of the street, and the car tracks made a double curve in order to keep the tracks in the middle of the widened street. It is contended that the effect of running the car at a rapid rate over these curves is to sway the passengers to the west on entering the first curve, and then to the east as the car leaves the second curve to take the straight track again going north. It was at or near this point that Nelson fell or was thrown from the car. Plaintiff's testimony tended to show that the car was going at a rate of about 20 miles an hour, and defendant's testimony that the speed was only about 8 or 10 miles an hour. There was a conflict in the testimony as to whether or not Nelson was under the influence of liquor at the time of the accident. The evidence also disclosed that immediately before the accident Nelson was standing on the lower step with his back to the east and his right hand holding the rail or handhold on the car, that he held to this rail after his feet were off the step, and that, when he fell, or was thrown from the car, he landed a considerable distance from the track, striking on the back of his head and receiving injuries from which he became unconscious and soon died. It also appears that

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at the scene of the accident the track inclines north toward the viaduct, so that the car was running on a downgrade at the time Nelson fell, and that the car ran about 250 feet before it was stopped after the accident.

Defendant contends that, since Nelson chose to stand on the lower outside step of the platform after he was requested by the conductor to come up from the step and go inside, he was guilty of such contributory negligence as a matter of law as forbids any recovery for damages. Our attention has been called to a number of cases that apparently hold that a party who elects to stand on the platform of a car is required to exercise the increased care that the increased danger entails, and that, if a passenger persists in standing on the step of the car after being warned of the danger and told to go inside, he cannot recover damages for injuries he may receive by being thrown from the car. *Neiboer v. Detroit Elc. Ry. Co.*, 128 Mich. 486, 87 N. W. 626; *Pike v. Boston Elev. Ry. Co.*, 78 N. E. 497, 192 Mass. 426; *Gaffney v. Union Traction Co. (Pa.)* 60 Atl. 488. In the first of the above cited cases, however, it appears that the person injured had climbed upon the deadwood, or "bumper," at the rear of the car, outside of the platform. The cars were running in close proximity to each other, and the conductor suddenly stopped the car upon which plaintiff was riding, and plaintiff was caught and injured by the car following, which bumped into the rear of the car where plaintiff was standing on the deadwood. The "bumper" was not a place to be used under any circumstances by a passenger. The position the plaintiff took was an extremely dangerous and perilous one, and the dangers of riding in such a position were apparent to any person of ordinary intelligence. That facts in that case are so different from those in the case at bar we do not think that it can be of any real value in determining the question of contributory negligence in this case. In *Pike v. Boston Elev. Co.*, *supra*, it appears that the plaintiff's intestate was injured, while riding upon the front platform of one of defendant's cars, in a collision between the car and a repair wagon in the early hours of a dark and foggy morning. It appeared that the street car company had signs posted up on its cars giving notice that passengers riding on the front platform did so at their own risk, and that plaintiff's intestate knew and had read the notice. Morton, J., in writing the opinion, says: "In the present case the notice did not forbid passengers to ride there, but stated the terms on which, if they rode there, they would be carried, namely, at their own risk. * * * In the present case the defendant furnished a safe place for the plaintiff's intestate to ride in, and, instead of riding there, he rode on the front platform, knowing that he thereby took the risk." Under the circumstances he was held to have assumed the risk, and plaintiff was not entitled to recover. In *Gaffney v. Union Traction Co.*, *supra*, it was unequivocally held that a passenger riding upon the back platform of a street car, who goes onto the step while the car is in motion

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and is thrown off by a sudden jerk, is guilty of such contributory negligence as will bar a recovery. But in this state the rule seems to be otherwise. In *Pray v. Omaha St. Ry. Co.*, 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717, it was held that it was not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will prevent a recovery for injuries received on account of the negligence of persons in charge thereof. The rule in this case was followed and reaffirmed in the case of *East Omaha Street Ry. Co. v. Gobola*, 50 Neb. 906, 70 N. W. 491. It would seem that a street railway company which permits the use of its platforms and steps for the carrying of passengers, and collects fares from the passengers riding in such places, is bound as a common carrier to use proper precaution for the protection of the passengers riding in such positions; and, in the absence of any warning to the passenger that such position is dangerous and in the absence of any rule of the street railway company brought to the knowledge of the passenger that it will not be liable for injuries received by passengers riding upon the platform or step, we think it cannot be said to be negligence per se for a passenger to ride in such position. A passenger riding in such position does not assume the risk of injury arising from the negligent operation of the car. In this case we think it was properly a question of fact whether or not plaintiff's intestate was guilty of such contributory negligence as would bar a recovery.

The defendant further contends that there was no competent evidence in the record of any negligence on the part of the defendant that would justify the submission of the case to the jury. The negligence complained of was the overcrowding of the car and the high rate of speed. The record is replete with evidence showing beyond cavil that the car was full, that passengers were standing in the aisle, and that the rear platform was quite well filled with passengers. Three witnesses testify that the car was moving at the rate of 20 miles an hour, and there were the other circumstances that at least one passenger standing in the aisle was jostled from his feet; that passengers standing inside the car were jerked first one way and then the other by the lurching of the car; that the car ran about 250 feet after the accident before it came to a stop; and that Nelson, when he went from the car, slid 10 or 15 feet, notwithstanding the fact that, when his feet struck the pavement, he was still holding to the car. So, if this evidence was properly admitted there was ample evidence to sustain the contention of the plaintiff that the car was moving at a high rate of speed, and, under the circumstances of the crowded condition of the car with passengers standing on the platform and steps, it was proper for the jury to determine whether or not the defendant was guilty of negligence which caused Nelson's death. In this connection defendant urges that the testimony of the witnesses Johnson, Albert Elsasser, and Henning Elsasser, to the effect that the car was moving at the rate of 20 miles an hour, was improperly

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admitted, for the reason that there was no showing that these witnesses were competent to give an opinion as to the rate of speed at which the car was going. This question has been before this court on other occasions. In *Omaha St. Ry. Co. v. Larson*, 70 Neb. 591, 97 N. W. 824, this language is used: "We think that a witness who sees a moving car and possesses a knowledge of time and distance is competent to express an opinion as to the rate at which a car is moving." This rule was sustained by numerous authorities cited in the opinion, and is approved in the case of *Lindgren v. Omaha St. Ry. Co.* (Neb.) 103 N. W. 307. In the instant case it appears that the witness Johnson had been a locomotive engineer for two years, that he was riding on the front platform of a car following close behind the one on which Nelson was riding. It also appears that both the Elsassers had been residents of the city of Omaha many years; that they lived at the time of the accident by the side of the track in question and immediately adjoining to the place where the accident occurred; that they both had been in the habit of observing street cars. All of these testified that they were able to state approximately the speed of the street cars, and from their observation of the car in question knew and were able to state its rate of speed. Under the rule laid down in the foregoing cases, we think these witnesses were competent to give an opinion as to the rate of speed at which the car was moving.

The defendant also contends that there was error in permitting the witness Mary Blair and Anna Nelson to impeach the defendant's witness Mead, who was the motorman in charge of the car, on his cross-examination was asked whether or not he had stated at the coroner's inquest that he was about 10 minutes behind time, and that he was hurrying to make up time, to which he answered that he had not so testified. The witnesses Blair and Nelson testified that he had made such a statement at the coroner's inquest. The point of the objection is that no time and place were stated in the question propounded to the motorman, Mead. But he was asked whether or not he had testified before the coroner's inquest, and he answered that he remembered of testifying before the inquest. The object of the rule requiring time and place to be fixed is to apprise the witness of whom and where, and under what circumstances, he was supposed to have made the statement to which his attention is called. In this case it appears that he recalled the fact of testifying before the coroner's inquest, and it would have been an idle form to have the statement of the exact time and place of the holding of the inquest. The witness was as fully apprised of the time and place as if it had been named in the question, and we can see no prejudicial error in not fixing the time and place in question, especially in view of the fact that no objection was made to the form of the question when it was propounded to the motorman, Mead.

The defendant complains because the court refused to strike out a portion of one of the answers of the witness Johnson. The

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question, answer, and motion are as follows: "Q. How close were the two cars together? A. Well, we was between Williams and that first curve at the time he was thrown off on the car he was on. Mr. Webster: I move to strike out that part of the statement that he was thrown off, as not being responsive to the question." The answer does not appear to be responsive to the question, and the court should, perhaps, have sustained the motion to strike; but, while it was error on the part of the court, in view of the whole of the testimony of the witness Johnson, which showed that he was an eyewitness to the accident and saw Nelson thrown from the car and fully detailed the manner in which the accident occurred, we fail to see how this error of the court could have prejudiced the rights of the defendant. At the most, it was only a voluntary statement of the witness, in which he in effect repeated evidence that had been properly admitted.

Defendant complains of the court's refusal to give instructions No. 2 and No. 4, asked by the defendant. From an inspection of the instructions given, we find that defendant's instruction No. 2 was embodied substantially in instruction No. 8, given by the court, and that instruction No. 4, asked by the defendant, was fully covered in the sixth paragraph of the court's charge to the jury. As to defendant's instruction No. 2, the same ground was covered in almost the identical language; and in instruction No. 6 the court covered and properly instructed the jury on the same subject-matter as was contained in instruction No. 4, asked by the defendant. Under the circumstances no error appears from the refusal to give these instructions.

Defendant complains of the giving of instruction No. 10 by the court, not from any misstatement of the law, but for the reason that it is claimed that it finds no support in the evidence. Defendant contends that there was no evidence of any unusual swaying or jerk of the car. This contention is not borne out by the record. There was ample evidence in the record tending to show that there was a violent lurching of the car at the time of the accident, and so the instruction was peculiarly applicable to the evidence.

Defendant complains of instruction No. 7, in the following language: "Before plaintiff can recover, he must go further and satisfy you by a preponderance of the evidence that the defendant was guilty of some act of negligence alleged in the petition." The complaint as to this instruction is that it was vague and indefinite, in that it does not tell the jury the precise act of negligence alleged in the petition. But, in instruction No. 5, given by the court, we find that the jury were told that their inquiry should be confined to the single proposition whether or not the car was being operated at a negligent rate of speed just prior to and at the time of the accident. There was no misstatement of the law in instruction No. 7, and, taken in connection with No. 5, the jury were properly instructed on this question. It is not necessary that the court should cover every point

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in a single instruction. It is sufficient if the instructions taken altogether cover the issues to be submitted to the jury for its consideration.

Instruction No. 8 is complained of for the reason that the same is said to be vague, indefinite, uncertain, confusing, and misleading. No misstatement of the law is pointed out, and we have carefully examined the instruction. While it is lengthy and complex, it contains no misstatement of legal rules so far as we can ascertain. Under the circumstances, the giving of the instruction is not reversible error.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

WEST BLOOMFIELD TP. v. DETROIT UNITED RY. CO.

(Supreme Court of Michigan, Oct. 29, 1906.)

[109 N. W. Rep. 258.]

Carriers—Street Railroads—Operation—Regulations—Equipment of Cars.—Where a franchise granted an electric suburban railroad required it to use cars with suitable appliance insuring the comfort and convenience of patrons, the fact that it failed to provide cars with water tanks and toilet rooms warranted a finding that they were not supplied with suitable appliances.

Certiorari—Review—Grounds of Decision of Lower Court.—Though, in mandamus to compel a railroad to comply with its franchise, relator claimed a violation of the franchise in three certain particulars, and the circuit judge refused to pass on one of them on the ground that the case would be appealed, a judgment having been entered against the railroad on all the questions, the question on which the circuit judge refused to pass was reviewable on certiorari.

Carriers—Street Railroads—Regulations—Sale of Tickets.—Where a franchise granted an electric suburban railway by a township required the road to sell "family tickets" entitling the purchaser or any member of his family to a certain number of rides from any point in the township to any point in a certain city and vice versa, the placing of such tickets on sale in a store in the city was not a compliance with the franchise, the passenger having a right to purchase such tickets on the cars.

Same—Fares.—A franchise granted by a township to an electric suburban railway provided that the rate of fare from any point in the township to the city, and vice versa, should, at no time, exceed the rate then charged by the company from the city of P. to D. and vice versa. Held, that the provision included the rate charged between

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P. and D. on any line subsequently built or purchased by the corporation.

Grant and McAlvay, JJ., dissenting in part.

Certiorari to Circuit Court, Oakland County; George W. Smith, Judge.

Mandamus by the township of West Bloomfield to compel the Detroit United Railway Company to comply with certain provisions of a franchise. Respondent was ordered to comply with such provisions, and it brings certiorari. Affirmed.

The relator, the township of West Bloomfield, granted a franchise to the Pontiac & Sylvan Lake Railway Company, a street railway corporation, its successors and assigns, to construct a road through the township. Among the conditions granted and accepted and which are involved in this case are: (a) All passenger cars to be used on said railway shall be of modern design, first class in every particular, and supplied with suitable appliances for a suburban railway, insuring the comfort, convenience, and safety of its patrons. (b) the rate of fare in said township was fixed, and it was provided "that there shall be sold by said company, its successors or assigns, a family ticket entitling the purchaser or any member of his immediate family to 10 rides from any point in said township to and in the city of Pontiac, and vice versa, which ticket shall be sold for \$1." (c) "Provided further that the rate of fare from any point in said township to the city of Detroit, and vice versa, shall at no time exceed the rate then charged by the company from Pontiac to Detroit, and vice versa." Another road known as the "Detroit & Pontiac Railway" was then in operation from Pontiac to Detroit. The respondent's road was on another route, and was a competing line with the Detroit & Pontiac. The respondent subsequently became the purchaser and successor of the Pontiac & Sylvan Lake Railway Company. The fare over the competing road from Pontiac to Detroit was 25 cents. The Pontiac & Sylvan Lake road was completed about December 1, 1898. The rate of fare to Detroit was 25 cents. This rate of fare was continued for about two years, until its purchase by the respondent, which continued the same rate for the period of about six months. Relator claimed that the respondent had violated its franchise or contract in three particulars: (1) That it has not equipped its cars, which run through the township, with toilet closets, and water tanks for drinking purposes. (2) That it has not kept on sale upon its cars and within its township the family ticket. (3) That it has charged 35 cents fare to Detroit, and vice versa, instead of 25. Issues were duly framed and decided in favor of the relator, the jury finding that the respondent had violated its charter in the three respects named, and the court entered an order directing it to comply with these provisions. The case is now before us for review upon the writ of certiorari.

Argued before CARPENTER, C. J., and McALVAY, GRANT, MONTGOMERY, and OSTRANDER, JJ.

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James H. Lynch and Brennan Donnelly & Van De Mark, for appellant.

M. F. Lillis (Clark, Jones & Bryant, of counsel), for appellee.

GRANT, J. (after stating the facts). 1. The jury, to whom the issues were submitted, found upon the evidence that the defendant's cars were not of modern design, and were not supplied with suitable appliances for a suburban railway to insure the comfort and convenience of passengers, in that they had no toilet rooms or water tanks. The evidence fully sustains the finding. A car in a city, which one may take on emerging from his home, or after a few minutes' walk, is different from a car running through the country, where its patrons often have to ride or walk an hour or more before entering the car. Facilities for attending to the demands of nature may be necessary in the one case, but not in the other.

2. The respondent placed on sale near its terminus, in a drug store in the city of Pontiac, the family tickets for which its franchise provided. This is not a compliance with its contract. It was not contemplated that the citizens of Bloomfield should go to Pontiac to buy tickets. Everyone had a right to purchase a family ticket at the place where he had a right to board the cars with his family for passage. These roads do not have ticket offices stationed through the country. They do their business on the cars, and, wherever passengers have a right to take the cars, there they have the right under the franchise to purchase these tickets. *Sternberg v. State* (Neb.) 54 N. W. 553, 19 L. R. A. 570; *Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79, 35 Am. St. Rep. 580.

3. The third question is the one which perhaps presents the greatest difficulty. The learned circuit judge did not pass upon it, but expressly stated that he expressed no opinion, that "the language could be read both ways," and added: "The case is one that will find its way to the appellate court anyhow, unless a compromise is agreed upon by the parties. As the respondent must take the case there if not satisfied with the findings of this court upon the questions of the cars and sale of commutation tickets, it is as well to issue the writ as to all the contentions of the petitioner, and let all be taken there for settlement by the respondent."

It is the duty of circuit courts to pass judgment upon cases presented to them for determination, and it then and then only becomes the duty of this court to review the conclusions reached by the circuit court. Circuit courts are not authorized by the Constitution and the law to sit and enter judgments solely that such judgments may be taken to the Supreme Court. Had this been the theory of the Constitution and the law the framers of the Constitution would have made provisions therefor. Suppose this were the only point in the case and the court had refused to hear and decide it, but had said: "It will go to the Supreme Court in any event, and I will therefore enter a judg-

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ment not based upon any conclusion or judgment of my own, but solely for the purpose of having it taken to the appellate court." Is this such a judgment as this court is called upon to consider and determine? I think not. The judge might as well have flipped up a cent to determine what judgment should have been entered. In my opinion, this is not such a judgment as this court is called upon to consider and determine. Where a judgment or decree involves several distinct claims, both parties may appeal where some are decided against each. My Brethren, however, are of the opinion that while the court should have passed upon all the issues, yet there is a formal judgment rendered against the defendant for which it is not responsible, and therefore it would not be just to send it back for a new trial. We must therefore determine the question. The language of the provision that the rate of fare from any point in the township to Detroit "shall at no time exceed the rate then charged by the company from Pontiac to Detroit, and vice versa," is unambiguous. It referred to the company mentioned in the franchise, but it included any line which that company or its assignee might at any time build or purchase. Counsel for respondent in their brief say: "The clear purpose of this provision was to provide that the township of West Bloomfield should get the benefit of such rate as might be brought about by competition between the companies, operating between the two terminal points and thus, though not by virtue of location naturally entitled to the benefits of competition, yet, by express contract, obtaining the benefit of the competition which may exist as to the terminal points." There was then a competing line between Detroit and Pontiac, a shorter route by several miles than the one through the township of West Bloomfield, and the rate of fare was 25 cents. The fare over this line of the respondent was fixed at the same rate as that over the competing road, and was retained for about three years, until the Detroit & Pontiac Railroad was purchased by the respondent. There was afterwards no competition, the competing line belonging to the respondent, the assignee of the company mentioned in the franchise. If the respondent had built another line from Pontiac to Detroit it could not have charged a higher rate over the old line than it did over the new. The terms of the franchise must be construed strictly against the respondent. When it purchased the Detroit & Pontiac Line it became a line of the company. The rate charged from Pontiac to Detroit over that line is now 25 cents. The respondent can charge no more over this line of its road. It cannot thus destroy the competition for which the relator in fact contracted.

The order of the court below is affirmed.

MCALVAY, J., concurred.

ROLFE v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan, May 24, 1906.)

[107 N. W. Rep. 899.]

Carriers—Transportation of Goods—Connecting Carriers—Loss of Goods.*—In an action against a terminal carrier for damage to goods shipped, the plaintiff must show, not merely that the goods were delivered to the initial carrier in good condition, but that they were in good order when received by the terminal carrier.

Same—Evidence.—In an action against a terminal carrier for injuries to goods, evidence held insufficient to show that they were in good order when received from the initial carrier.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Charles A. Rolfe against the Lake Shore & Michigan Southern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed, and new trial ordered.

Argued before MCALVAY, GRANT, BLAIR, MONTGOMERY, and OSTRANDER, JJ.

Weaver, Morgan & Priddy, for appellant.

Bird & Sampson, for appellee.

MONTGOMERY, J. The plaintiff's consignor delivered to the Chicago, Burlington & Quincy Railroad at Denver for shipment to plaintiff at Adrian, Mich., an automobile of the value of \$1,600, in good condition. The car was shipped by the Chicago, Burlington & Quincy Railway in B. & A. car No. 11,601. It was accepted by defendant in the same car in Chicago, and was forwarded in that car to Adrian. On opening the car at Adrian it was found that the automobile had never been braced in the car, and that its motion back and forth on the floor of the car had been guarded against in no other way than by nailing across the car in front of the front wheels and back of the rear wheels a 2 by 4 strip; that the automobile had been jolted over these strips, so that any jolting of the car would cause the vehicle to run back and forth on the car floor; that this had resulted in serious damage. The plaintiff recovered for the entire damage, and defendant brings error.

The questions discussed were saved by appropriate exceptions, and proper assignments of error were duly filed. The important question is whether a case was made meeting the require-

*For the authorities in this series on the subject of the burden of proving which one of the connecting carriers was guilty of the negligence causing loss of or injury to the freight, see foot-notes appended to *Houston, etc., R. Co. v. Everett* (Tex.), 18 R. R. R. 578, 41 Am. & Eng. R. Cas., N. S., 578.

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ments laid down in the two cases of *M., H. & O. R. R. Co. v. Langton*, 32 Mich. 251, and *M., H. & O. R. R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453. These two cases establish the rule for this state that where goods are transported by successive carriers, and an action is brought against the terminal carrier for damage to the goods, it is not enough to show that the goods were delivered to the initial carrier in good condition, but it is incumbent upon the plaintiff to show that they were in good order when received by the defendant. We feel bound to adhere to this rule, which has prevailed in this state for more than 30 years.

The plaintiff's counsel does not ask us to depart from the rule of these cases, but insists that he has brought his case within it. The plaintiff's brief assumes that the machine was reloaded by defendant at Chicago. Of this we discover no evidence whatever. On the contrary, the inference is entirely the other way, as the machine came through from Denver to Ardian in the same car. Can it be assumed that the damages to this car were caused by defendant, rather than the initial road? Certainly there is no proof of the fact. There is no testimony tending to show that this car was subjected to any unusual jolting by defendant while under its control. If the inference be that the automobile was jolted from its insecure position by the ordinary action of a freight train, it should be noted that the car was transported by the initial road a much greater distance than the defendant hauled it, and was subject to the same vicissitudes. The inference is therefore as strong, if not stronger, that the damage was caused by the initial carrier as that it was caused by defendant. It must be held that the proofs failed to fix the responsibility upon defendant.

Judgment reversed, and a new trial ordered.

FLORIDA EAST COAST RY. CO. *v.* WADE *et al.*

(Supreme Court of Florida, April 9, 1907.)

[43 So. Rep. 775.]

Carriers—Injury to Passenger—Negligence of Employee.*—When the negligence of an employee of a railroad company is a proximate cause of injury to a passenger, the company is liable in damages for such injury sustained by the passenger as should have been foreseen as the probable proximate result of the negligence.

Same—Evidence.*—In order to recover damages in an action against a railroad company for injuries to a passenger because of the negligence of an employee of the company, there must have been injury sustained by the passenger, there must have been negligence of the employee, such negligence must have been a proximate cause of the injury, there must have been no independent efficient cause intervening between the negligence of the employee and the injury to the passenger, and the injury sustained must be such as should have been contemplated as a probable proximate result of the negligence.

Negligence—Proximate Cause.—A proximate cause is one that directly causes, or contributes directly to causing, the result, without any independent efficient cause intervening between the cause and the result or injury. The particular injury sustained need not have been in fact contemplated; but the injury sustained must be such as should have been contemplated as a natural and probable proximate result or consequence of the cause or negligence.

Carriers—Negligence of Employee—Proximate Cause.*—Where a conductor of a railroad train tells a passenger in response to an inquiry that her destination will be reached in 20 minutes, that it is the next stop, and when the train next stops before reaching her destination the passenger leaves the train from the rear, without the knowledge of any of the trainmen, without being told her destination had been reached, and without making inquiry, when she was not sure the 20 minutes had elapsed, when she stepped off the train at 2 o'clock in the morning into water at a place where no station or lights were in sight, and when the passenger is held to have known that she had a right to be informed of the arrival of the train at her destination, and to have a reasonable time to alight at a reasonably safe and suitable place, the information given to the passenger by the conductor, even if done negligently, cannot be said to be a proximate cause of injury by sickness to the passenger as the result of the fright she experienced because of getting off the train at the wrong place, where the surroundings excited her fear. The act of the pas-

*For the authorities in this series on the question whether negligence must be the proximate cause in order to entitle the person injured to recover, see foot-notes appended to *Byrd v. Southern Express Co.* (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., N. S., 150; *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553.

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senger in leaving the train under the circumstances stated, and her fright and subsequent illness, could not reasonably have been contemplated as a natural, direct and proximate result of the information given to the passenger by the conductor in response to an inquiry from her.

Same.*—A judgment for damages against a railroad company for injury to a passenger because of the negligence of an employee of the company, is contrary to law, and will be reversed, when the evidence show that such negligence was not a natural and probable proximate cause of the injury sustained, and that such injury should not reasonably have been contemplated.

Cockrell and Hocker, JJ., dissenting.

(Syllabus by the Court.)

In Banc. Error to Circuit Court. Duval County; Rhydon M. Call, Judge.

Action by Ersula J. Wade and Albert J. Wade against the Florida East Coast Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

D. U. Fletcher and *R. P. Marks*, for plaintiff in error.

Jno. W. Dodge, for defendants in error.

WHITFIELD, J. This writ of error was taken to a judgment rendered by the circuit court for Duval county in favor of the defendants in error against the plaintiff in error.

The declaration alleges a contract between Ersula J. Wade and the Florida East Coast Railway Company for carriage of the former as a passenger by the latter from St. Augustine to Gifford, Fla.; "that when plaintiff became a passenger as aforesaid, to be carried to Gifford, Fla., it became and was the duty of the defendant to advise and direct the plaintiff as to the proper time and place and manner of alighting from said train; that plaintiff, being a stranger on said road, and having never traveled thereon, asked the conductor of said train several times en route 'how far it was to Gifford;' that the conductor told plaintiff that he would get her check for her baggage just before the train arrived at Gifford; that said conductor went into the car where plaintiff was, and at his request she delivered to him the check for her baggage, at which time she asked said conductor how long it would be before they would get to Gifford, whereupon he, the conductor, replied, 'About 20 minutes, * * * in fact, the next stop'; and there being no porter or other trainman present to announce the name of any stopping place for defendant's train, and plaintiff relying in good faith upon what said conductor had told her, and believing that the next stop of said train was the place of her destination, as she had been told by said conductor, plaintiff disembarked therefrom when the said train next stopped in obedience to the directions given her by said conductor;" that she got off at Wabasso about 2 o'clock in the morning on a very dark and damp night, entirely alone, and there

*See foot-note on preceding page.

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were no accommodations at all at said station; that because of the conditions and surroundings at Wabasso she "became badly frightened," and "suffered great mental pain and anguish, and became greatly frightened and alarmed, and by reason of the premises and such gross carelessness of the defendant the plaintiff suffered great bodily pain, became and was sick and disordered, and confined to her bed in sickness for a period of about five months, suffering great pain and agony," etc. Plaintiff Ersula J. Wade claims damages in \$19,633. Plaintiff Albert James Wade was and is the husband of Ersula J. Wade, and by reason of the premises he has suffered great loss and damage in procuring medical assistance, medical supplies, nurse, etc., for his said wife, making a total of actual expenses of \$367.

A motion to strike portions of the declaration, and a demurrer to the declaration, were overruled. The defendant filed pleas: (1) Not guilty; (2) denying that plaintiff, in obedience to the directions, solicitation, and initiation of defendant's conductor left the train at Wabasso; (3) that plaintiff left the train at Wabasso without the direction, knowledge, or consent of defendant's conductor; (4) the injury suffered by plaintiff was caused by her own negligence.

The plaintiff Ersula J. Wade testified: That on December 31, 1903, she was a passenger on defendant's train from St. Augustine to Gifford, Fla. "After purchasing the ticket I got aboard the Florida East Coast train en route for Gifford; and, after we got down a little distance, I was a little uneasy, because I saw I was going to reach my destination very late. After reaching a town called, I think, Titusville, the class of colored people that got on was very rough. That section of the country seemed altogether different from any that I had ever traveled over, and I felt uneasy and worried. In fact, it was that season of the year when the rougher element of our people do travel a good deal of the time, and they were mainly men—some of them using bad language and drinking from open flasks, which I am not accustomed to, and I felt frightened and a little uneasy. And when the conductor would come in the coach at different times I asked him how long it would be before we would reach Gifford, and he told me at one time: 'When we get very nearly there, I will come and get your check.' Then, as we got on down further, he came in there and asked me for my check. I handed him the check, and again asked him how long it would be before we would reach Gifford. He said: 'In about 20 minutes;' that it was 'the next stop.' In what seemed to me to have been possibly that length of time the train made a stop, and I got my packages together and alighted from the train. It was quite a long coach, and when I alighted I couldn't see anything at all. I didn't see any station or any lights. * * * I supposed it had been 15 or 20 minutes" from the time the conductor took the check until the train stopped where plaintiff got off. No one connected with the train was present when she got off, or immediately thereafter. "It was between 2 and 3 o'clock, and as I

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got off the train I stepped down in a puddle of water." She got off at Wabasso, and became frightened because of the situation in which she was placed, and to protect herself got into an empty freight car she found near by on the track, "and stayed there until dawn. * * * I was pregnant at the time, between two and three months. Before I got off of the train I was in perfect health. I felt no uneasiness, except ~~that~~ I felt nervous from the things that were told me about that section of the country. * * * I took the train from Wabasso that evening, and went on down to Gifford, and when I arrived at Gifford I immediately went to bed. I felt completely upset—had pains in my abdomen and I felt threatened with an abortion. I felt that it might happen." She remained in Gifford some days, and returned to her home in Westside, Miss., via Atlanta, Ga., and Vicksburg, Miss. She reached home January 9, 1904, "in an exceedingly nervous condition—suffering from nervous attacks, palpitation of the heart, and threatened abortion. * * * But these nervous attacks were not controlled, and at the end of the period, between the 25th and 30th of January, I aborted, and was ill then for three weeks," etc. "It was not until the latter part of May that I was enabled to go out."

The conductor testified that on "leaving Sebastian, about 10 miles this side of Gifford, her destination, I asked her for her trunk check. Gifford being a flag stop, where passengers have baggage, we left the check, so as to put the baggage off; otherwise, we carry it through to the first agency station. She asked me how long it would be before we'd be there. I told her about 20 minutes." The plaintiff was in "the combination car on the rear end" of the train. The trainman is "always on the forward end, unless we have passengers. Then he swings off and goes to the rear end, to look for the colored passengers to get off." The only passenger for Wabasso "got off the forward end of the passenger coach. I positively did not" tell plaintiff that Gifford was the next stop. "The station Quay is between Wabasso and Gifford, also."

It is contended that the verdict and judgment are contrary to law.

When the negligence of an employee of a railroad company is a proximate cause of injury to a passenger, the company is liable in damages for such injury sustained by the passenger as should have been foreseen as the probable proximate result of the negligence.

There must have been injury sustained by the passenger. There must have been negligence of the employee. Such negligence must have been a proximate cause of the injury. There must have been no independent efficient cause intervening between the negligence of the employee and the injury to the passenger. The injury sustained must be such as should have been contemplated as a probable proximate result of the negligence. A proximate cause is one that directly causes, or contributes directly to causing the result, without any independent efficient cause in-

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intervening between the cause and the result or injury. The particular injury sustained need not have been in fact contemplated; but the injury sustained must be such as should have been contemplated as a natural and probable proximate result or consequence of the cause or negligence. *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co.*, 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33, 65; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Moore v. Lanier* (Fla.) 42 South. 462; *Western Union Tel. Co. v. Milton* (decided at this term) 43 South. 495; 6 Current Law, 757; *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558; *Savannah, F. & W. Ry. Co. v. Cosens*, 46 Fla. 237, 35 South. 398; *Seaboard Air Line Ry. Co. v. Barwick*, 51 Fla. 304, 41 South. 70; *Moore on Carriers*, p. 377, § 2.

The only act of the conductor claimed to have been negligent was his telling the plaintiff that Gifford would be reached in 20 minutes—that it was the next stop. Did this justify the plaintiff in leaving the car from the rear when the train next stopped, in the dark, with no houses or lights in sight, where there was no one to advise or to assist her, without being told to do so by any one? The contract of the defendant was to carry the plaintiff to Gifford; and it was the duty of the company to notify her when to get off at Gifford. She had a right to rely upon the proper performance of this duty by the company, and she was not required to alight from the car before being advised that her destination had been reached. Even if the conductor had informed her that the next stop would be Gifford, she could and should have waited to be informed of the arrival of the train at that place. It is true she had a right to leave the car before reaching her destination, and in the absence of fault on its part the company could not be held liable for injuries resulting from her voluntarily so leaving the car. It appears from the testimony that Gifford was in fact two stations beyond, and that it and the intermediate station were flag stops.

Even if the conductor told the plaintiff that Gifford was the next stop, he also told her it would be 20 minutes before reaching there. This did not justify the plaintiff in leaving the train from the rear, where no trainmen were, when it next stopped, without making inquiry, when she was not sure 20 minutes had elapsed, when she had not been advised that her destination had been reached, and at a place where she had to step into water in getting off, with no station or light in sight. If the conductor had negligently told the plaintiff that Gifford was the next stop, when in fact it was not, he qualified it by stating the time required to reach Gifford, and it cannot be said that he should have contemplated that as a result of the information he gave plaintiff she probably would voluntarily get off the train the next time it stopped, without the knowledge of the trainmen and regardless of the conditions or surroundings, at a place when no station or light was in sight, when she was not told her destination had been reached, when she was not even sure the 20 minutes

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had elapsed, and without making inquiry, when she had a right to be told of the arrival of the train at her destination and to be given a reasonable opportunity to alight in a reasonably suitable place.

Suppose, on account of an accident, the train had from necessity stopped for a brief period in some dangerous place before reaching Gifford; would the defendant be liable for injury to the plaintiff, resulting from leaving the train during such a stop without the knowledge or consent of the company's servant?

The plaintiff testified that she stepped off in water and saw no lights or station. This was enough to put her upon inquiry. Notwithstanding that, she left the car from the rear without giving notice to any one. She also testified that she supposed 15 or 20 minutes had elapsed from the time the conductor told her that Gifford would be reached in 20 minutes, when the train stopped and she got off. She guessed at the time, was not sure the 20 minutes had elapsed, and got off in the dark from the rear of the car, where no one was in sight, and no lights or station to be seen, without being told the place was Gifford. This indicates at least carelessness on her part, and a lack of ordinary precaution for self-preservation.

Even the plaintiff was doubtful if the time stated by the conductor had expired. Therefore it is not certain that the information she received from him controlled her action.

She testified that the people of her race with whom she was riding were offensive to her in their deportment, and that she was nervous because of this and of reports she had heard. This may have hastened her departure from the train, and made her neglect her own duty to herself; but the defendant company is in no way responsible for the deportment of members of her race as she saw it and heard of it.

If she was in doubt as to expiration of the time stated to her by the conductor, she should have made inquiry before voluntarily leaving the car from the rear, when no one saw her, and stepping off in the water, with no lights or station in sight.

The conductor denies that he told the plaintiff that Gifford was the next stop, and states he told her Gifford would be reached in 20 minutes.

Taking the testimony of the plaintiff as true, it does not appear that the information given to her by the conductor was the proximate cause of her illness. She left the car voluntarily, without the conductor's knowledge or consent. Even if leaving the car was the proximate cause of her illness such leaving was not because of the negligence of the conductor, but solely because of her own negligence in guessing at the passage of time, in leaving the car from the rear when no one saw her, without being told Gifford had been reached, and in stepping off into the water at the wrong place, when it was dark, and no light or station was in sight. If the conductor should not have contemplated the passenger would leave the car from the rear under the circumstances stated, the mere absence of trainmen from the rear of the

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car when the passenger alighted is not negligence on the part of the railroad company.

Even if the conductor was negligent in giving plaintiff the information, it cannot be said he should have contemplated as the probable and proximate result of such negligence that the plaintiff would guess at the passing of time, would make no inquiry, would leave the car from the rear when no one saw her, without being told that her destination had been reached, and step off into water at a flag station, when it was dark, and no station or lights in sight, when she is held to know that she had a right to be informed of the arrival of the train at her destination and to have a reasonable time to alight at a reasonably safe and suitable place.

Assuming it to be the duty of the railroad company to announce to the passengers generally the arrival of a train at stations where passengers alight, this would impose upon the passengers some duty to await the announcement of the arrival of the train at a station before alighting, especially where the stations are not known to the passengers. In this case the passenger testified that she was not familiar with the stations on the road. There was no announcement that her destination had been reached. Ordinary prudence would have prompted her to at least make some inquiry before alighting under the circumstances disclosed by this record.

Under the circumstances shown by this record the verdict and judgment cannot be sustained, since it does not appear that the injury complained of was the natural and probable proximate result of any negligence of the defendant's employee. This conclusion renders it unnecessary to discuss the other assignments of error.

The judgment is reversed, and a new trial awarded.

SHACKLEFORD, C. J., and TAYLOR and PARKHILL, JJ., concur.
COCKRELL and HOCKER, JJ., dissent.

WABASH R. CO. *v.* THOMAS.

(Supreme Court of Illinois, April 17, 1906. Rehearing Denied Oct. 10, 1906.)

[78 N. E. Rep. 777.]

Carriers—Contract of Shipment—Construction.—Where a carrier receives freight consigned to a point beyond its line, it impliedly agrees to transport the goods to that place.

Same—Limitation of Liability.*—Limitations of a carrier's liability contained in a bill of lading are not binding on the shipper, unless it appears that such restrictions were assented to by him.

Same—Action—Burden of Proof.†—In an action against a carrier, the burden is on it to show that restrictions of liability contained in the bill of lading were assented to by the consignor.

Same—Limitation of Liability—Claims for Injuries to Shipment—Reasonableness of Provision.‡—Where a carrier was negligent in failing to feed and water horses during transportation, whereby several of them were injured, and some of them subsequently died, the nature of the injury was such that the actual damage could not by any reasonable degree of diligence have been discovered and sworn to within 10 days after they were unloaded; and hence a provision in the contract of shipment, requiring a claim for damages to be made within 10 days, could not be said, as a matter of law, to be reasonable.

Scott, C. J., and Cartwright, J., dissenting.

Appeal from Appellate Court, Third District.

Action by F. E. Thomas against the Wabash Railroad Company. From a judgment of the Appellate Court (122 Ill. App. 569), affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. N. Travous, for appellant.

W. H. Clinton, *H. S. Tanner*, and *Penwell & Lindley* (*Walter C. Lindley*, of counsel), for appellee.

WILKIN, J. This is an appeal from a judgment of the Appel-

*For the authorities in the series on the question whether the shipper's mere acceptance of a contract of shipment includes his assent to its terms, see foot-notes appended to *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787; foot-notes appended to *Frasier v. Charleston & W. C. Ry. Co.* (S. Car.), 19 R. R. R. 768, 42 Am. & Eng. R. Cas., N. S., 768; foot-notes appended to *Nashville, etc., Ry. v. Stone & Haslett* (Tenn.), 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88.

†See foot-note's appended to *Powers Mercantile Co. v. Wells Fargo & Co.* (Minn.), 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

‡ For the authorities in this series on the subject of notices of claims against railroads, see foot-notes appended to *Reynolds v. Great Northern Ry. Co.* (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70; foot-notes appended to *Eckert v. Pennsylvania R. Co.* (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475.

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late Court for the Third district, affirming a judgment of the circuit court of Vermillion county in favor of the appellee, against the appellant for \$2,400 and costs of suit. The declaration consisted of two counts substantially alike, charging the defendant, as a common carrier, with a breach of duty in failing to safely carry 25 head of horses from Council Bluffs, Iowa, to Paris, this state; negligently failing to properly feed and water the animals while en route; carrying them by slow trains; and suffering the cars in which they were loaded to stand on the track for an unreasonable length of time—all of which resulted in their becoming reduced in flesh, diseased, and lessened in value, and in consequence of which neglect 12 of them died. A plea of not guilty was filed by the defendant, and upon the trial by jury a verdict was returned and judgment rendered in favor of the plaintiff.

It appears from the evidence that at the date of the shipment appellee resided in Paris, Ill., though for 16 years immediately preceding that time he had been in western Nebraska, where he was engaged in raising and shipping stock. The horses in question were first shipped from Nebraska to Council Bluffs over the Union Pacific Railway, arriving at Council Bluffs about 9 o'clock Saturday evening. They were unloaded, fed, and watered, and the next morning appellee called on the Wabash agent at that place to arrange for shipment over the appellant's line. He testified that he told the agent that he wanted the stock sent to the stock yards at St. Louis, and there fed before being sent to Paris. The agent prepared an application and contract of shipment, the former of which purports to have been signed by the plaintiff, and the latter by the agent, on behalf of the company, and by the plaintiff. The contract was for shipment from Council Bluffs to St. Louis, and stated that the carrier had agreed to forward the car of horses from Council Bluffs to St. Louis; that its responsibility extended only to its own line; that appellee had agreed to care for the horses while in transit, load and unload, and feed and water them at his own risk and expense; and that in case of loss or damage he would make and present his claim in writing, verified by affidavit, within 10 days after the horses were unloaded, or be barred from recovering anything on account of the same. The horses were loaded into a Street's Western Stable car about 12 o'clock Sunday night and delivered to the company about 2:45 Monday morning, July 27th, leaving for St. Louis about 15 minutes later. They arrived at the yards in North St. Louis at 6:12 o'clock the following morning, and the car in which they were being shipped was immediately delivered to the Terminal Association of St. Louis, which, in turn, delivered it to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company at East St. Louis for transportation to Paris. Plaintiff offered evidence to the effect that he told the conductor in charge of the train to St. Louis that he wanted the horses unloaded, fed, and watered at the stock yards in St. Louis, and was assured that it would be done. This was denied by the con-

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ductor. Appellee claims that, after thus being assured that the horses would be unloaded at the stock yards, he left the train at St. Louis to get his breakfast, and then went to the stock yards to see about his horses, but could not find them, and spent the day searching for them, until about 11 o'clock at night, when he learned that they had been forwarded to Paris. The car stood all day in the yards at St. Louis, and the horses were neither fed nor watered until after they arrived at Paris. They left St. Louis some time during the night, arrived at Paris the next day, and were unloaded. They had been en route about 52 hours, and when unloaded went immediately to a pool of stagnant water and began to drink, but were driven into another pen. Their manes and tails were partly eaten off, and they were very weak and gaunt. They were removed to a farm not far distant, where they were attended by a veterinary surgeon, but 12 of them died as a result of their treatment, and 8 were sold two months later for \$375. On the back of the contract of shipment was the following: "July 26, 1903.—Shippers, F. E. Thomas, Kimball, Nebraska; consignee, F. E. Thomas, Paris, Illinois; No. of cars 3455 S. W. S.—Pass F. E. Thomas, parties in charge and accompanying stock. F. S. Blanchard, Agent." The car in which the animals were shipped was marked Paris, Ill. The night operator of the company at Luther, North St. Louis, testified: "July 28, 1903, train 96 [in which the horses were shipped] arrived at North St. Louis 6:12 o'clock in the morning. There was a car of horses in the train for Paris, Illinois, care of the Big Four. The consist showed this. I reported this car load of stock to the Merchants' Bridge connection," etc.

Appellant's line east from Council Bluffs, Iowa, terminated at St. Louis, and it is insisted by its counsel that the burthen of proof was upon the shipper to show a special agreement on its part to transport the horses beyond its own line, without which the carrier's obligations were fully discharged when it delivered the freight in good condition to its connecting carrier. We think, even under this claim, the evidence fairly tended to prove that the contract was for a through shipment. The company, from its conduct, must have so understood it. When, however, a carrier receives freight to be transported, marked to a particular place, he is *prima facie* bound to carry and deliver at that place. By accepting the goods so marked he impliedly agrees so to do, and he ought to be answerable for the loss. *Illinois Central Railroad Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Illinois Central Railroad Co. v. Johnson*, 34 Ill. 389; *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 97, 5 Am. Rep. 92.

But it is said the agreement on its face limits the liability of the defendant to its own line. Even if it should be admitted that such is the fair construction of the bill of lading, it was still a question of fact for the jury and the Appellate Court whether or not that contract was assented to by the shipper. Whatever may be the rule in other jurisdictions, it is well settled in this state that whether the terms of a special agreement limiting the lia-

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bility of the common carrier was understood, and entered into by the consignor and assented to by him, is a question of fact. The earlier cases so holding will be found cited in *Chicago & Northwestern Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596. In that case we said: "By the adjudications of this court the rule is established, as a principle of the common law, that, where a carrier receives and accepts goods marked to a place beyond the terminus of its own line, its receipt for goods so marked to carry and deliver at the point so marked. * * * Neither can the carrier limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property. Starr & C. Ann. St. c. 114, par. 96, and chapter 27, par. 1. By these two sections (the first adopted in 1872, and the second in 1874) the right to limit a common-law duty in a receipt was prohibited. It has however, been recognized by frequent decisions of this and other courts that a common-law duty may be limited by express contract. * * * The rule that a limitation of a carrier's liability for safe carriage and delivery of freight beyond the terminus of the carrier's own line may be made by restrictions contained in that part of the bill of lading which may constitute a contract has been recognized in this state. [Citing Cases.] Where a contract limiting the liability of a carrier is contained in a bill of lading which in its entirety constitutes both a receipt and contract, the onus is on the carrier to show the restrictions of the common-law liability were assented to by the consignor (*Field v. Chicago & Rock Island Railroad Co.*, 71 Ill. 458; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191); and whether there is such assent is a question of fact. The mere receiving the bill of lading without notice of the restrictions therein contained does not amount to an assent thereto"—citing cases. And in that case it was further held, whether the limitations in the bill of lading were assented to by the consignor was a question of fact determined by the Appellate and trial courts adversely to the appellant. To the same effect are *Illinois Central Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527, and *Chicago & Alton Railroad Co. v. Davis*, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143.

If it be conceded that the case of *Black v. Wabash, St. Louis & Pacific Railway Co.*, 111 Ill. 351, 53 Am. St. Rep. 628, announces a different rule, still the later cases would govern. The Black Case does, however, hold that all facts and circumstances connected with the execution of the special contract were proper to be considered by the jury. The reasons for imposing the burthen of proof upon the carrier in such case, as distinguished from ordinary cases of contract between parties, will readily suggest themselves. But it is sufficient for the purposes of this case to say that the law is settled adversely in this state to appellant's contention. The parol evidence is admitted, not for the purpose of changing or varying the terms of a written contract, but for the purpose of showing whether the written contract was assented to by both parties.

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The tenth condition in the contract of shipment provides that no action shall be brought for damages "unless a claim for such loss or damage shall be made in writing, verified by an affidavit of the party of the second part or their agent, and delivered to the freight claim agent of the party of the first part, at his office in the city of St. Louis, within ten days from the time said stock is removed from said cars; and it is also agreed that, if any loss or damage occurs upon a connecting line, then such line shall not be liable unless a claim shall be made in like manner and delivered in like time to some officer or general agent of the line on which the loss or injury occurred." That there was on the part of the connecting carriers gross negligence, amounting to absolute cruelty to the horses, cannot be denied. Nor can it be said that, in view of the nature of the injury to the animals, the actual damage could, by any reasonable degree of diligence, have been discovered and sworn to within 10 days after they were unloaded, and it cannot therefore be said, as a matter of law, that the foregoing provision was reasonable. *Baxter v. Louisville, New Albany & Chicago Railway Co.*, 165 Ill. 78, 45 N. E. 1003. But the question of the plaintiff having understandingly assented to that provision having been determined adversely to appellant by the jury and the Appellate Court, he was not barred of his right of action by his failure to comply with it.

The contention that the trial court erred in instructing the jury that the burthen of proof was upon the carrier to show that the plaintiff had assented to the terms and conditions of the contract of shipment is answered by *Chicago & Northwestern Railway Co. v. Simon*, *supra*, and *Illinois Central Railroad Co. v. Carter*, *supra*, and by the still later cases of *Chicago & Northwestern Railway Co. v. Calument Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68, and *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Patton*, 203 Ill. 376, 67 N. E. 804.

It is also insisted that the trial court erred in refusing to admit in evidence the application of the plaintiff purporting to have been made by the plaintiff to the agent of the company at Council Bluffs. The plaintiff testified, though somewhat indefinitely, that he did not sign the application, and there is no positive evidence that he did. We are unable, however, to set what particular injury resulted to the defendant by the court's refusal to admit it in evidence. It was not materially different from the agreement which was admitted in evidence.

All controverted questions of fact having been conclusively settled adversely to the appellant, and questions of law alone being subject to review here, we are of the opinion that the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

KARR v. MILWAUKEE LIGHT, HEAT & TRACTION CO.

(Supreme Court of Wisconsin, Sept. 24, 1907.)

[113 N. W. Rep. 62.]

Appeal—Verdict—Evidence—Review.—The Supreme Court, on reviewing an assignment that the court erred in refusing to direct a verdict for defendant, will only examine to ascertain if there is any evidence which, taken most favorably to plaintiff, may sustain the judgment for him, and, if there is, countervailing evidence of defendant cannot be considered.

Carriers—Carriers of Passengers—Invitation to Passengers.—An electric railway company maintained between its parallel tracks a night signal device, with directions to passengers to hold up the handle thereof, and thereby cause a light to appear until a car came in sight. Passengers only boarded the cars from the outside rail of each track. Held, that the device was an invitation to passengers to cross the track to give the signal, and to recross to board the car.

Same—Who Are Passengers—Commencement of Relation.*—One who in good faith signals in the recognized manner an interurban car,

*For the authorities in this series on the question whether a person may be a railway passenger before he boards a train or street car of the carrier, see *Snipes v. Norfolk & So. R. (N. Car.)*, 23 R. R. R. 53, 46 Am. & Eng. R. Cas., N. S., 53 (person attempting to board car after being told by motorman that it was to leave first); *Alabama City, etc., Ry. Co. v. Bates (Ala.)*, 23 R. R. R. 564, 46 Am. & Eng. R. Cas., N. S., 564 (burden on plaintiff to prove he was a passenger, in action for injuries alleged to have occurred while he was boarding car); *Walter v. Wilmington City Ry. Co. (Del. Sup'r. Ct.)*, 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727 (person with foot and hand hold on street car she was attempting to board); *Southern Ry. Co. v. Johnson (Ala.)*, 20 R. R. R. 58, 43 Am. & Eng. R. Cas., N. S., 58 (person injured while attempting to board moving train); *Illinois Cent. R. Co. v. Proctor (Ky.)*, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531 (one walking on side track from depot to train on main track, in order to take passage on such train, was a passenger); *Duchemin v. Boston Elevated Ry. Co. (Mass.)*, 13 R. R. R. 679, 36 Am. & Eng. R. Cas., N. S., 679 (person approaching street car with intention to board); *Kroeger v. Seattle Electric Co. (Wash.)*, 16 R. R. R. 689, 39 Am. & Eng. R. Cas., N. S., 689 (person boarding car inside car barn was not passenger); *Atchison, etc., Ry. Co. v. Holloway (Kan.)*, 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648 (person entering station and purchasing ticket with intention of taking passage on train soon to arrive); *Foster v. Seattle Electric Co. (Wash.)*, 13 R. R. R. 640, 36 Am. & Eng. R. Cas., N. S., 640 (person intending to take passage on street car was not a passenger); *Garvey v. Rhode Island Co. (R. I.)*, 15 R. R. R. 30, 38 Am. & Eng. R. Case., N. S., 30 (person signing street car); *Puendleton's Adm'r. v. Richmond, etc., R. Co. (Va.)*, 19 R. R. R. 73, 42 Am. & Eng. R. Cas., N. S., 73 (person waiting at station for train); *Haselton v. Portsmouth, etc., Ry. (N. H.)*, 6 R. R. R. 705, 29 Am. & Eng. R. Cas., N. S., 705 (person walking along platform to take next seat in street car after assisting aged companion to board car); *Andrews v. Yazoo & M. V. R. Co. (Miss.)*, 16 R. R. R. 587, 39 Am. & Eng. R. Cas., N. S., 587 (person intending to

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with a view to board it, which signal is responded to by the motorman by whistling or setting his brake, is a passenger.

Same—Contributory Negligence.†—A passenger, who is invited by the carrier to cross a track in going to or leaving his train, is chargeable only with reasonable care, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing; he having the right to believe that trains would be so regulated as to permit his crossing in safety.

Same—Question for Jury.—Whether a passenger struck by a car while crossing a track, after having given a signal for the car to stop by operating a device maintained between that track and a parallel track, was guilty of contributory negligence, held for the jury.

Same—Negligence—Question for Jury.—Whether an electric railway company was guilty of negligence in maintaining a signal device between its parallel tracks and in operating a car, injuring a passenger who had signaled it to stop by operating the device, held for the jury.

Appeal from Circuit Court, Milwaukee County; Orren T. Williams, Judge.

take train not due for an hour or so, and who had purchased no ticket. was not a passenger while waiting in office of station room by permission of station agent, where he was assaulted by such agent in an altercation between them over a private matter); *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226 (person at station too soon was not a prospective passenger); *Holcombe v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 482, 31 Am. & Eng. R. N. S., 482 (who are prospective passengers); *Chicago Terminal Transfer R. Co. v. Gruss* (Ill.), 5 R. R. R. 704, 28 Am. & Eng. R. Cas., N. S., 704 (question for jury whether prospective passenger walking on bridge was a trespasser or licensee); *Chicago Union Traction Co. v. O'Brien* (Ill.), 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95. (person running towards moving street car to get on board); *Chicago Terminal Transfer Co. v. Kotoski* (Ill.), 5 R. R. R. 530, 28 Am. & Eng. R. Cas., N. S., 530 (whether person intending to become a passenger was a trespasser while crossing trestle, by invitation of the conductor, in order to reach train, was question for jury); *Farley v. Cincinnati, H. & D. R. Co.* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 404; *Tillett v. Lynchburg & D. R. Co.* (N. Car.), 2 Am. & Eng. R. Cas., N. S., 167 (person on railroad premises with intention of engaging passage); *Chicago & E. I. R. Co. v. Jennings* (Ill.), 22 Am. & Eng. R. Cas., N. S., 127 (person with commutation ticket crossing tracks in street to take train is not); note, 20 Am. & Eng. R. Cas., N. S., 128, et seq.

†For the authorities in this series on the subject of the degree of care required of a passenger for his own protection, see foot-notes appended to *Farrell v. Great Northern Ry. Co.* (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408.

For the authorities in this series on the subject of the right of a passenger to rely upon the assumption that the carrier has performed, or will perform, its duties to him, see foot-notes appended to *Farrell v. Great Northern Ry. Co.* (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408.

For the authorities in this series on the subject of the duty of passenger to lookout for danger, see foot-notes appended to *Farrell v. Great Northern Ry. Co.* (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408.

Karr v. Milwaukee L., H. & T. Co

Action by Mathias Karr against the Milwaukee Light, Heat & Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Clarke M. Rosecrantz, for appellant.

John Toohey, for respondent.

TIMLIN, J. The plaintiff has a verdict and judgment, and the only errors assigned are the refusal of the court below to direct a verdict for defendant and refusal to grant judgment for defendant. In such case it is necessary only to examine the evidence for the purpose of ascertaining if there is any credible evidence which, taken in its most favorable aspect to the plaintiff, might directly or by proper inference sustain the judgment below. If there is such evidence, countervailing evidence on the part of the defendant cannot be considered.

The defendant, an interurban common carrier operating its electric cars by the center pole overhead system, has at Brookdale Station, where the injury in question occurred, two parallel tracks, 7 feet 9 inches apart between the inner rails, extending nearly north and south, but somewhat curving at this point. The east track is used by the north-bound cars, and the west track by the south-bound cars. These cars can only be boarded by passengers from the outside rails of each track, and in daytime the passengers stand outside the outside rail and give a signal with the hand for the car to stop. The car makes only a short stop, just long enough to allow the passenger to embark in the same manner in this regard as street railways in cities are operated. Brookdale Station is a place where the defendant is accustomed to receive and discharge passengers, but there is no building or platform, the roadbed is widened for a short distance, and the usual stopping place for receiving and discharging its passengers is about 25 feet north of a trolley pole standing midway between the tracks, having on it a board sign with the word "Brookdale," and having on it a device for holding up a rod or lever closing an electric circuit, and thereby causing an electric light to appear 10 or 12 feet up on the pole, and so enable prospective passengers to signal approaching cars at night. On this night signal device there are printed instructions for such passengers, in these words: "Hold up handle until car is in sight." This same signal is employed for north-bound and south-bound cars, but the south-bound car stops within 25 feet, and before reaching the signal light, while the north-bound car runs 25 feet past the signal light to reach the stopping place. The lever or rod for operating the signal light was on the east side of the trolley pole, the overhang of the passing car was 1 foot 10 inches, the diameter of the trolley pole upwards of a foot, and the person standing on the east side of the pole operating the signal light would be within 18 inches of the passing car on that side. Taking the position of the signal light in the center between the tracks, the printed directions thereon, and the necessity of boarding the car on the side of the car opposite to the signal light, there was an invitation to

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night passengers to cross the track to the signal light in order to give the signal, and to cross the track again after giving the signal in order to board the car, with no other visible designation of the point where the car would stop with reference to the signal light, and without any directions whether to cross the track the last time before the car arrived at the signal light or afterwards. The situation was full of danger, particularly on a dark night, and this danger could only be avoided by the passenger knowing or remembering that the signaled north-bound car ran by the signal light before stopping and by remaining between the tracks until after it passed him and stopped, and then crossing the track behind the car, and by knowing or remembering that this applied to the north-bound car while the south-bound car was the one which stopped before it reached the signal light, and by knowing or remembering the distance between the tracks and the overhang of the cars, and that he could, with the exercise of care in choosing his position between the tracks in the night, avoid being struck by a car if he remained between the tracks. One who had by daylight observation become familiar with these conditions and these measurements and the place of stopping the north-bound car might, and probably would, remain between the tracks after he had held up the signal light and until the car arrived, but a person not possessing this familiarity, and arriving on a dark night where distances cannot be so accurately estimated, might ordinarily, and usually, in view of the position of the signal light on the center pole, the printed and inadequate instructions thereon, and the necessity of boarding the car from the outside, cross over to that side immediately upon letting go of the signal light. This was for the jury to decide, and upon their determination of this question and upon the legal relation of the plaintiff to the defendant depended in large part the charge of contributory negligence against the plaintiff.

The night in question was dark and foggy. The plaintiff, intending to board the north-bound car of defendant at Brookdale and coming from the east, crossed the east track to the signal light and listened for an approaching car. When he heard the car approaching, he pressed on the rod and displayed the signal light standing on the east side of the pole bearing that light and within about three feet of the inner rail of the east track. As soon as he saw the headlight of the approaching car, he let go the signal light, which immediately extinguished, and started eastward briskly, crossed the east track, and was struck at or about the east rail of the east track, having made not more than two or three steps after letting go of the signal rod. We are not informed at what point or at what distance south of the signal light he first saw the headlight, but the motorman saw the signal light when he was about 105 or 110 feet south of the signal light, and whistled to the prospective passenger his acceptance of the signal, as was usual, and immediately began to apply his brake. He saw the signal light disappear, no doubt, at the time the plaintiff released his hand from the signal rod,

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and started to cross the track when he (the motorman) was at the next pole south of the pole bearing the signal, or 92 feet and some inches south of the signal light; but after striking the plaintiff he ran quite a distance past the usual place of stopping, and afterward backed up about 100 feet to where the plaintiff lay some distance northeast of the signal light. The car approached the station in question at a very high rate of speed, some of the witnesses for the plaintiff claiming at the rate of 40 miles an hour, and the distance which the car ran by the signal light and by its usual stopping place indicates an excessive and negligent rate of speed in approaching such a station on a dark night circumstanced as this station was. This case is not ruled by *Hogan v. Ry. Co.*, 121 Wis. 123, 98 N. W. 928; *Schroeder v. Railway Co.*, 117 Wis. 33, 93 N. W. 837; *Bohn v. Racine*, 119 Wis. 341, 96 N. W. 813; *Watermolen v. Fox River, etc., Co.*, 110 Wis. 153, 85 N. W. 663, or that class of cases with reference to the alleged contributory negligence of the plaintiff. When the plaintiff in good faith signaled the approaching car in the regular and recognized manner, and the motoneer responded to that signal by whistle or the act of setting his brake, the plaintiff became a passenger. "One becomes a passenger when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer." *Webster v. Railway Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, and cases in note. One in good faith going through the depot to take passage on the cars is a passenger, although he has not bought a ticket. *Grimes v. Pa. Co. (C. C.)* 36 Fed. 72; *Allender v. Railway Co.*, 37 Iowa, 264. One who enters upon depot grounds by the approaches furnished by the carrier is a passenger. The fare does not have to be paid, nor the train entered; but the person must merely enter within the control of the carrier at the depot through the usual channels of business with the intention in good faith of becoming a passenger by either paying fare before or after entering the train. *Baltimore & Ohio R. R. Co. v. State*, 81 Md. 371, 32 Atl. 201; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *North Chicago Street Ry. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672. The rule relative to contributory negligence on the part of the passenger in such case is well stated by the Circuit Court of Appeals of the Sixth Circuit in *Graven v. MacLeod*, 92 Fed. 846, 35 C. C. A. 47, following *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491, as follows: "Where a carrier so operates its trains at a station that

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a passenger is impliedly invited to cross an intervening track in going to or leaving his train, he is chargeable only with the exercise of reasonable care to avoid danger, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing such track." See Rose's Notes to 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491.

The reason for the distinction between the case of a passenger crossing a track under such circumstances, and the case of an ordinary pedestrain bearing no such relation to the railroad company, appears to rest upon the possibility or probability that a reasonably prudent man in the exercise of ordinary care might well believe that, in the face of such implied invitation to cross, the movements of passing trains would be so regulated or adjusted as to permit his crossing in safety. In the instant case, the jury was authorized to infer from the evidence that the plaintiff, as a reasonably prudent man, understood that he was obliged to cross the east track in order to board the car in question, and to cross at the time and in the manner in which he did cross, and that due care would be exercised by the defendant for the safety of those so crossing by stopping the car south of or at the signal light. The jury had also the right to consider that the plaintiff was so near the inner rail and in such a position in giving the signal that an ordinarily prudent man, knowing that the car would stop only for a moment to permit him to embark, might have considered it the proper course to cross the track at the time, and in the manner in which, he did cross it in order to enter the car. It was essentially a question of fact, not one of law, whether or not an ordinarily prudent man would, under the circumstances, have done as the plaintiff did, and whether or not the plaintiff was conscious that the car was approaching in the sense of continuing its movement across and beyond the point at which the plaintiff attempted to cross the track. There was therefore evidence to sustain the finding of the jury negating contributory negligence, and there was also evidence to sustain the finding of the jury that the defendant was guilty of negligence in maintaining this signal for the use of passengers at the place and under the circumstances in question, and also in the operation of its car on the night in question in approaching such a place.

It follows that the judgment of the circuit court should be affirmed.

The judgment of the circuit court is affirmed.

VASSOR *v.* ATLANTIC COAST LINE R. Co.

(Supreme Court of North Carolina, Sept. 18, 1906.)

[54 S. E. Rep. 849.]

Carriers—Freight Trains—Authority of Conductor.*—Plaintiff boarded defendant's local freight train, and asked the conductor in charge if he could come back with him the next day on his train. The conductor replied that he could, and that he was to help unload and load freight. Plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter. Held, that the conductor had no authority to employ plaintiff as a servant or permit him to work his passage on the train, and hence the carrier owed plaintiff neither the duty owing to a passenger or employee.

Railroads—Injuries to Persons on Trains.†—Where plaintiff, when injured by the explosion of an engine, was riding on a freight train by permission of the conductor, and there was no evidence of wanton or willful injury, plaintiff could not recover.

Master and Servant—Personal Injuries—Relation of Parties.—Where, at the time plaintiff was injured while riding on a freight train under an invalid employment by the conductor, he was neither an employee nor a passenger, the fact that the carrier, several months after the injury, issued plaintiff a pass to enable him to return to his home, in which he was described as an "injured employee," was inad-

*For the authorities in this series on the question who are, and are not, passengers, see foot-notes appended to *Conroy v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 384, 42 Am. & Eng. R. Cas., N. S., 384; foot-notes appended to *Chicago, etc., R. Co. v. Troyee* (Neb.), 19 R. R. R. 350, 42 Am. & Eng. R. Cas., N. S., 350; foot-note appended to *Robertson v. Boston & N. St. Ry. Co.* (Mass.), 19 R. R. R. 123, 42 Am. & Eng. R. Cas., N. S., 123; *Chicago Union Traction Co. v. O'Brien* (Ill.), 19 R. R. R. 95, 42 Am. & Eng. R. Cas., N. S., 95; foot-notes appended to *Chicago & A. R. Co. v. Walker* (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596; *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

For the authorities in this series on the subject of the duties and liabilities of a railroad with respect to persons transported on its freight trains, see foot-notes appended to *Rogers v. Choctaw, etc., R. Co.* (Ark.), 18 R. R. R. 592, 41 Am. & Eng. R. Cas., N. S., 592.

†For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see foot-notes appended to *Norfolk & W. Ry. Co. v. Bell* (Va.), 19 R. R. R. 263, 42 Am. & Eng. R. Cas., N. S., 263; foot-notes appended to *Chicago, etc., R. Co. v. Weber* (Ill.), 19 R. R. R. 34, 42 Am. & Eng. R. Cas., N. S., 34; *Weisser v. Southern Pac. Ry. Co.* (Cal.), 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861.

For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to trespassers on their trains, see foot-notes appended to *Kansas City, etc., R. Co. v. Williford* (Tenn.), 19 R. R. R. 549, 42 Am. & Eng. R. Cas., N. S., 549.

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missible to show a ratification of the conductor's attempted employment.

Clark, C. J., dissenting.

Appeal from Superior Court, Northampton County; Shaw, Judge.

Action by Jack Vassor against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action for personal injury sustained by plaintiff while on defendant's freight train. The plaintiff testified that on the 26th day of May, 1902, he boarded defendant's local freight, running from Rocky Mount to Richmond, at Garysburg, N. C. He then described the circumstances under which he went upon the train: "As I was going to Richmond I asked the conductor on the train if I could come back with him the next day on his train. Capt. Moody had charge of the train going to Richmond. He said 'Yes.' I was to help unload freight and load freight. I went to Richmond to take another man's run. He told me he would give me his place for 10 days. He was a brakemen. I was expecting to get his place that night and come back next day. Did not get it, as he decided not to give it to me. I got on train between Richmond and Manchester after it started. I did not see conductor that day. Could not say he was on that day. It was the same train that I went to Richmond on, known as 'No. 90.' Capt. Moody was conductor on train that blew me up. The train stopped in Manchester yards, when I got on. William Savage was there. I got on flat car not loaded, next to car loaded with barrels. Box car behind us. The conductor did not know whether I was on train or not. I saw engineer, fireman, and first brakeman when I got on train day I was hurt, but did not speak to any one except Savage. The train was local freight, passed Garysburg every day coming and going. I could see it. Same train Mr. Gwaltney was engineer on. He saw me on the train. Two of the brakemen saw me, but did not speak to but one of them. He told me to get on and help unload barrels at next station, Clopton. The brakemen unloaded the car. The engine exploded not more than 10 minutes after I got on the car." There was testimony in regard to the extent of injury and value of services. Plaintiff offered to introduce pass issued by defendant September 16, 1902, to plaintiff as an "injured employee" from Richmond to Garysburg. Upon defendant's objection it was excluded. Plaintiff excepted. Upon the conclusion of plaintiff's evidence defendant moved for judgment of nonsuit. Motion allowed, and plaintiff appealed.

Peebles & Harris, for appellant.

Day & Bell, T. W. Mason, and Murray Allen, for appellee.

CONNOR, J. (after stating the case). The correctness of his honor's ruling depends upon whether the defendant sustained any

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contractual relation to the plaintiff from which a duty arose to him. The testimony presents no question of public duty or duty to the public as discussed in *McNeill v. Railroad*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227, and other cases in which persons were permitted to go upon passenger trains or mixed trains on which passengers were taken. It is too well settled to call for the citation of authority that a railroad company has the right to classify its trains and assign to them such service as is reasonable. That in the exercise of this right it may operate trains exclusively for carrying freight, and that when it has done so no person has a right to demand that he be carried upon such trains as a passenger. It is equally well settled that, before a person can enter upon such a train and acquire the rights of a passenger, he must show some contract made with some servant or agent of the corporation authorized to make such contract. Such authority may be shown either by express grant or necessary implication growing out of the nature or character of the employment. In view of these general and well-settled principles, the question arises whether the conductor, Moody, in charge of the freight train upon which plaintiff was injured, had any authority to establish any contractual relation between plaintiff and the defendant corporation, either as passenger or servant and impose any duty upon defendant the breach of which, followed by injury, gave a cause of action. The plaintiff insists that by the permission granted him to go upon the train to Richmond and return he became a passenger, or, if he is in error in this, he was by the agreement with the conductor made the employee or servant of the corporation. For the purpose of disposing of this appeal it is not important, or even necessary, to discuss the question whether he became a passenger or an employee, because if he was, at the time of the injury, either, his right to go to the jury on the question of negligence would be the same. We are of the opinion that he was neither a passenger nor an employee.

Assuming; for the purpose of the discussion, that the conductor undertook to employ plaintiff, and that such employment extended to the return trip, the question of power is presented. Elliott, in his work on Railroads, says: "The authority of the conductor ordinarily extends to the control of the movement of his train and to the immediate direction of the movement of the employees engaged in operating the train. * * * His authority does not, ordinarily, extend to making contracts on behalf of the company, but there may be cases of urgent emergency when he may make a contract for the company. He is to administer the rules of the company rather than make contracts for it. * * * The conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties." Elliott on Railroads, 302. In *Eaton v. Del. L. & W. Railroad*, 57 N. Y. 382, 15 Am. Rep. 513, it is said: "It is a fallacy to argue that a conductor is a general agent for this

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purpose, assuming that his power would, as a rule, place him under the class of general agents; he only holds that position for the management of a freight train. The fact that the same word 'conductor' is used to designate servants in two kinds of business, which the defendant has made perfectly distinct, tends to confusion. There is no real analogy between the duties of a conductor of a passenger train and those of the manager of a strict freight train. A different class of men would naturally be employed in the two cases. The defendant has a right to assign specific duties to the one distinct from those performed by the other. It is a familiar rule in such a case that an agent cannot increase his powers by his own acts; they must always be included in the acts or conduct of the principal. No act of a conductor of a freight train will bind the company as to carrying passengers, unless the principal in some way assents to it." In the same case it is said: "The employment of brakemen is no part of the ordinary duty of a conductor. The company gave him no power to make any arrangement of the kind. * * * It is not one of those cases where he has an apparent authority, including the act in question, but owing to a secret fact does not have it in the particular case." In *Baldwin on Railroads*, it is said: "While he may at times have occasion to make or construe, or even vary, contracts of the company, that is not his chief office. He holds, however, a somewhat analogous position to that of a ship master. The owners of the railroad have put him in charge of the persons and property on board his cars. In case of emergency, when prompt action, if any, must be taken to protect the interest confided to his care, his ordinary powers would become greatly enlarged." In *Files v. Boston & Albany Railroad*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411, it is said: "In the case at bar, the conductor had no general authority, so far as shown, to take passengers on the locomotive engine, or any special authority to take the plaintiff. The conductor was not only in charge of a freight train, but on a road intended solely for the transportation of freight. The locomotive engine was obviously not intended for passengers, and he had in his charge no vehicle, nor any part of a vehicle, in any way adapted for passengers. In riding for his own convenience in a place where it was not safe or prudent to ride, the plaintiff took on himself the risks of so doing, whether he did so by the license or on the invitation of the conductor. It was not within the apparent scope of the freight conductor's authority to permit persons to ride on his freight train, far less on the locomotive engine thereof; nor can the fact that he had allowed the plaintiff to do so at a previous time, and also that the local freight agent and a conductor were known by the plaintiff to have ridden on the locomotive engine, make the defendant responsible for accidents which occurred thereby." To the same effect are *Smith v. L. E. St. L. Railroad Co.*, 124 Ind. 395, 24 N. E. 753; *Gardner v. N. H. Railroad Co.*, 51 Conn. 143, 50 Am. Rep. 12. In *Texas & Pacific R. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118, the

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question was discussed at length, and it was said: "If the conductor of a freight train, made up of cars suitable only for carrying freight, can, without authority of the railway company, expressly or tacitly given, receive passengers upon such train and bind the railway for the risk of transportation, a conductor of a passenger train may with equal propriety load the coaches of his train with cotton or grain, and make the company liable as a common carrier of freight." The distinction between the powers and rights of the conductor of a freight train and of a passenger train are clearly pointed out in the opinion in this case. It is, however, suggested that the burden would be upon the defendant to show that the conductor had no authority to make the contract of service.

The authorities are to the contrary. In *Eaton v. Railroad*, *supra*, it is said: "There is nothing in the business of a conductor which would lead to the conclusion that he had authority to make contracts with persons to act as brakemen. His apparent duties are to carry forward a train after it is organized. The business of organizing it is, in its nature, wholly distinct. It is, in fact, committed to a train dispatcher. Under such circumstances there is no act on the part of the defendant by which he can be estopped from showing the conductor's real authority any more than a commercial house would be if one of its travelers, in the course of a journey, assumed to hire a clerk to do business for his employers at home." In *Purple v. Railroad*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700, Sanborn, C. J., says: "In the absence of any rule, the practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier that is evidently not designed for the transportation of passengers is unlawfully there and is a trespasser." In *Cooper v. Lake E. & W. R. R.*, 136 Ind. 366, 36 N. E. 272, Howard, C. J., said: "While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of the appellant. * * * No custom, rule, or regulation of the appellee company is shown by which the appellant might pay his way by working on the train, assisting the brakeman or other employee. * * * At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to receive him. Any dangers to which he might become exposed were wholly at his own risk. The company would be liable only for willful injury to him." In *Powers v. B. & M. Railroad*, 153 Mass. 188, 26 N. E. 446, in an opinion of Mr. Justice Devens, it is said: "It was held in *Wilton v. Middlesex Railroad*, 107 Mass. 108, 9 Am. Rep. 11, that the invitation there given by the defendant's servant to the plaintiff to ride on the horse car which the servant was driving was within the general scope of his employment, and, even if it was contrary to the instructions of the driver, she was not a trespasser. In the case at bar, the plaintiff was not on a passenger train, and he was riding

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in the caboose of a freight train, in a place which he could not have failed to know was not intended or adapted for the use of passengers, but solely for the accommodation of the defendant's employees engaged in managing the train. Even if, therefore, the plaintiff had an invitation from the conductor of the freight train, he could not have supposed that the conductor was acting within the general scope of his employment, or that, independently of any rules of the corporation, the conductor had any authority to extend such an invitation. The ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such trains, or to accept them as passengers." In *Eaton's Case*, *supra*, Dwight, C. J., speaking of a contention similar to that of plaintiff's says: "The contention of the plaintiff must go to the length of maintaining that the company was bound by the act of the conductor to take the plaintiff into its service. * * * The conductor's authority to carry can only be incidental to his power to make a valid engagement for the plaintiff's service. The admission of such a doctrine would subvert familiar rules of the law of agency." We have been unable to discover any authority in which it is held that a conductor of a freight train has any power, save in case of an emergency, to employ servants to assist him in operating his train.

We do not deem it necessary to consider the liability of the defendant if there had been wanton or willful injury; there being no evidence of either. It is said that the case should have gone to the jury. This suggestion is based upon the theory that there was evidence of a contractual liability imposing upon the defendant the measure of duty prescribed for either a passenger or employee. As we have seen, neither relation existed. There was therefore no question to be submitted to the jury. The plaintiff having failed to lay the basis upon which any such duty arose, there was no inference to be drawn from the testimony by the jury. The effect of the agreement made between plaintiff and conductor was for the court. There is no uncertainty as to its terms or legal signification. As was said in *Eaton's Case*, *supra*: "The solution of the questions at issue is not to be sought in the rules of law appertaining to common carriers. It must be obtained from the principles of the law of agency. The true inquiry is whether the conductor, as an agent of the defendant, had the power to take the plaintiff upon the train in such a way as to bind the defendant as a carrier to him as a passenger"—and, we may add, "or an employee." The answer to this question being in the negative, and there being no evidence of wanton or willful injury, his honor correctly directed judgment of nonsuit.

We find no error in the ruling of his honor excluding the pass. The fact that, several months after the injury, the defendant issued to the plaintiff a pass from Richmond to Garysburg, describing him as an injured employee, does not tend to show any ratification of the attempted employment by the conductor. The exception cannot be sustained.

No error.

LEXINGTON RY. CO. *v.* HERRING.

(Court of Appeals of Kentucky, Sept. 27, 1906.)

[96 S. W. Rep. 558.]

Appeal—Verdict—Conflicting Evidence.—A verdict will not be interfered with on appeal, unless it is palpably against the evidence.

Carriers—Injury to Passenger—Evidence—Character—Contributory Negligence.*—Where, in an action for injuries to a street car passenger, defendant claimed that she attempted to get on the car while in motion, evidence that plaintiff had been frequently seen to get off and on street cars while in motion was inadmissible.

Same—Injuries to Passengers—Actions—Evidence.—Where, in an action for injuries to a street car passenger while attempting to board a car at a point other than that marked for the stopping of cars, whether the car in fact stopped to permit plaintiff to get aboard was disputed, evidence that defendant's cars stopped at points on the line other than the place indicated by a sign in question was admissible.

Same.—Where, in an action for injuries to a street car passenger while attempting to board a car at a point other than that marked as a stopping place by a sign, plaintiff claimed that the car stopped to receive her as a passenger which was denied, evidence concerning the propriety and necessity of stopping defendant's cars at regular stopping places indicated by signs was inadmissible.

Trial—Instructions—Refusal.—Where, in an action for injuries to a passenger by the sudden starting of a car as she was attempting to board the same, the instructions given clearly presented the only issue in the case, which was whether the car did or did not stop to receive plaintiff as a passenger, it was not error for the court to refuse to charge that defendant's liability would attach only in the event its employees in charge of the car started the same when they knew that plaintiff was endeavoring to board it.

Carriers—Injury to Passenger—Commencement of Relation.†—A carrier owes no duty whatever to a person intending to become a passenger, until she has become a passenger by either getting on, or attempting to get on, the car after it has stopped for the purpose of permitting her to board it.

Same—Contributory Negligence.‡—It is in general not negligence per se for a passenger to attempt to board or alight from a moving street car.

*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

†See preceding case, and foot-notes.

‡For the authorities in this series on the question whether it is contributory negligence to board a moving street car, see foot-notes appended to *Chicago Union Traction Co. v. Lundahl* (Ill.), 16 R. R. R. 15, 39 Am. & Eng. R. Cas., N. S., 15; *Murphy v. North Jersey St. Ry. Co.* (N. J.), 15 R. R. R. 14, 38 Am. & Eng. R. Cas., N. S., 14; *Berry v. Utica Belt Line St. Ry. Co.* (N. Y.), 17 R. R. R. 669, 40 Am. & Eng. R. Cas., N. S., 669 (boarding moving street car near barrier surround-

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Damages—Personal Injuries—Instructions.—In an action for personal injuries, an instruction that plaintiff, if entitled to recover, should receive such sum as should fairly compensate her for her injury, and that, in estimating the injury done, the jury should allow plaintiff compensation for any pain suffered by her, mental and physical, and any further sum which would fairly compensate her for the loss of her foot, was erroneous; the jury being confined to such a sum as would fairly compensate plaintiff for the value of time lost, for reasonable expenses incurred, for physical and mental suffering caused by the injury, and for any reduction of her power to earn money.

Appeal from Circuit Court, Fayette County.

“Not to be officially reported.”

Action by Allee Herring against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Stoll & Bush, R. C. Stoll, Morton, Webb & Wilson, and Allen & Duncan, for appellant.

C. J. Bronston and Wallace Muir, for appellee.

CARROLL, C. The appellee, a young lady living in Lexington, brought this action against the appellant to recover damages for personal injuries sustained by her, and caused, as she alleged, by the sudden starting of a car that she was in the act of getting on. The injury sustained by appellee resulted in the loss of one foot, and there is no serious complaint about the amount of the verdict in her favor, which was for \$7,000, if she was entitled to recover at all.

The appellant has a double-track line of road, running out of South Broadway, and it crosses Water, Vine, and High streets in the order named, and passes on, crossing other streets to the

ing excavation); *Boulfrois v. United Traction Co. (Pa.)*, 18 R. R. R. 70, 41 Am. & Eng. R. Cas., N. S., 70.

For the authorities in this series on the question whether it is contributory negligence to alight from a moving street car, see foot-note appended to *Lee v. Elizabeth, P. & C. J. Ry. Co. (N. J.)*, 8 R. R. R. 923, 31 Am. & Eng. R. Cas., N. S., 923; *Richmond Traction Co. v. Williams (Va.)*, 9 R. R. R. 754, 32 Am. & Eng. R. Cas., N. S., 754; *Elwood v. Connecticut Ry. & L. Co. (Conn.)*, 12 R. R. R. 518, 35 Am. & Eng. R. Cas., N. S., 518 (alighting from moving street car under belief that car had stopped at terminus, according to conductor's announcement); *Knoxville Traction Co. v. Carroll (Tenn.)*, 13 R. R. R. 707, 36 Am. & Eng. R. Cas., N. S., 707 (instruction); *Dallas Rapid Transit Co. v. Payne (Tex.)*, 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25 (alighting from moving street car after signaling, and car had slowed up, question for jury); *Birmingham Ry., L. & P. Co. v. Willis (Ala.)*, 16 R. R. R. 523, 39 Am. & Eng. R. Cas., N. S., 523 (question for jury); *Walker v. Georgia Ry. & Elec. Co. (Ga.)*, 16 R. R. R. 654, 39 Am. & Eng. R. Cas., N. S., 654 (alighting from rapidly moving car at night); *Behen v. St. Louis Transit Co. (Mo.)*, 18 R. R. R. 103, 41 Am. & Eng. R. Cas., N. S., 103; *Cody v. Duluth St. Ry. Co. (Minn.)*, 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117; *Boulfrois v. United Traction Co. (Pa.)*, 18 R. R. R. 70, 41 Am. & Eng. R. Cas., N. S., 70.

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southern limits of the city. There is a gradual ascent beginning at Water street and continuing to a point about 179 feet beyond High street, and at this point, which may be called the top of the grade, appellant had posted at the time of the injury a sign "cars stop here." About 10 o'clock in the evening of October 10, 1903, the appellee and her mother and sister walked on High street to Broadway, and started south on Broadway toward her home. For the purpose of getting on the car that was coming up the grade and going south on Broadway, appellee walked out in the middle of the street, and continued to walk south on Broadway until she reached a point a short distance south of High street, but not opposite the sign. When she arrived at this point the car going south came up to where she was, and, as she testifies, stopped. She then placed her right foot on the running board of the car, near the middle, and, while in the act of raising her hands to seize the handle bar of the car in order to lift herself up to a seat on the car, it suddenly started, and she was thrown to the ground; the rear wheel of the car passing over her left foot. The main question, as manifested by the record, is whether or not the car stopped. Both sides directed all their evidence to this issue. Four witnesses, including appellee, testified that the car did stop. Eight witnesses for appellant, including the motorman, conductor, and inspector, of the company, testified that the car did not stop. The witnesses who testified on this point were all in such position that they could see whether or not the car stopped. Appellee's theory is that the car stopped for the purpose of permitting her to get on, and that, while in the act of getting on, it suddenly started. Appellant's theory is that the car did not stop, and that appellee was injured by her own negligence in attempting to board the car while it was in motion.

Counsel for appellant concede that there was sufficient evidence to take the case to the jury; but they earnestly insist that the verdict is flagrantly against the evidence, and that the trial court for this reason should have granted a new trial, and that this court should reverse the case and order a retrial. The evidence for appellant and appellee upon the controlling question is directly and sharply in conflict. Four witnesses testified to one state of fact, and eight witnesses to another; and it is insisted that, aside from the number of witnesses who testified, the car did not stop; that their opportunity of knowing whether it stopped or not was so much greater than that of the witnesses for appellee that the verdict cannot be sustained; and that the jury, influenced by their sympathy for the misfortune of the appellee, disregarded the testimony. The purpose of jury trials in controverted questions of fact is to get the judgment of 12 impartial men selected for the purpose by both parties to the litigation. These triors of facts see the witnesses, observe their manner of testifying, notice their demeanor on the witness stand. In their presence witnesses are subject to a rigid examination, every competent detail within their knowledge is produced, they have a perfect right in the exercise of the power vested in them to disre-

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gard all or any part of the testimony of any witness, to accept as true all that other witnesses state. They have the right to weigh and consider the evidence, and to arrive in their own way at a conclusion concerning it. It is entirely proper that the courts and judges should be reluctant to disturb the findings of a jury upon a question of fact. Juries are clearly as competent and well qualified in ordinary cases to determine correctly simple questions of fact as are judges, and the average judgment of 12 good men—or 9, if less than the whole jury make the verdict—is not a thing to be lightly set aside. In giving deference to the conclusion arrived at by a jury, the judge does not surrender any of his power, or lessen in any degree the importance of his office. He simply yields his opinion to that of the men whom the parties have selected to ascertain the truth as it falls from the lips of the witnesses. If the judge was so authorized, and undertook to set aside the verdict of a jury in every case where it did not comport with his conclusion, trial by jury would be a mockery, and the opinion of the court would be substituted for that of a tribunal established by law for the purpose of arriving at the facts. There are, of course, cases in which juries are so carried away by either sympathy or passion or prejudice, that they lose sight of the testimony, and the weight it is entitled to, and base their conclusion upon their personal conviction of the right or wrong of the case. When this condition of affairs presents itself, the courts do not hesitate to interfere; but the mere fact that a great number of witnesses are introduced to prove a certain state of facts, and a lesser number to disprove it, is not sufficient to authorize a court to disturb the conclusion reached by the jury. The rule that a verdict of a properly instructed jury will not be interfered with, unless it is palpably and flagrantly against the evidence, is as firmly fixed in the jurisprudence of this state as any principle of law resting on judicial deliverance can be, and has been announced in repeated decisions of this court, beginning with its earliest history. *Outen v. Merrill*, 2 Litt. 305; *Huges v. McGee*, 1 A. K. Marsh. 29; *L. & N. R. Co. v. Graves' Assignee*, 78 Ky. 74; *Standard Oil Co. v. Eiler*, 61 S. W. 8, 22 Ky. Law Rep. 1643; *Thomson v. Thomson*, 93 Ky. 437, 20 S. W. 373; *Young v. Young*, 39 S. W. 23, 19 Ky. Law Rep. 54. In obedience to this uniform ruling by this court, the trial judge properly declined to set the verdict of the jury aside.

Appellant offered to prove by a number of witnesses, including appellee, that they had frequently seen appellee getting on and off street cars while in motion. The court rejected this evidence, and of this ruling the appellant complains. Whether it is competent or not in the trial of negligence cases to prove the personal habits of a party, the authorities are conflicting. Our attention has been called to several cases, decided by courts of other states, holding such evidence competent. Wigmore, in his work on Evidence (section 199), says that: "In a few jurisdictions the character of a defendant or of an employee or of a plaintiff for negligence or prudence may be used to show that he probably was

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not, or was, careful on a given occasion." And, in stating the objection to the admission of this testimony, he says: "The reason of unfair surprise is also applicable; for the party charged cannot even guess the time, place, and occasion that may be predicated for his supposed act, and has no means of showing the testimony to be fabricated. The reason of confusion of issues always operates, for disputes over carelessness would soon obscure the main issue. Add to this that a careless act or two may be done by the most prudent person, and that particular instances, unless repeated and emphatic, throw little light on the general disposition. For these reasons almost all courts exclude such testimony." Greenleaf in his work on Evidence (volume 1, § 14), says: "Because of the usual slight probative value of the party's character and of its confusion of issues of little purpose, and for other reasons variously stated by different judges, not easy to disentangle or define, it has come to be generally accepted that the character of a party in a civil case cannot be looked to as evidence that he did or did not do an act charged. It is sometimes said that there is an exception where an act of negligence is in issue, and there were no eyewitnesses to the occurrence, and that here the person's character for negligence or prudence is admissible; but this exception does not generally prevail."

This court, in *L. & N. R. Co. v. Berry*, 88 Ky. 223, 10 S. W. 472, 21 Am. St. Rep. 329, which was an action for negligence, and an effort on the part of the railroad company to prove previous similar acts showing contributory negligence on the part of Berry, in discussing this question, said: "The appellant, in making out its defense, insisted on proving by the appellee and others that he was in the habit of jumping on the cars when they stopped at the station, and had been warned of the danger, and hence the jury had the right to infer that it was the boy's negligence that caused the injury, and not the defect in the platform. If the habit of the boy had been established as appellant offered to prove, it would not have authorized the jury to say that he was stealing a ride on the cars, and in getting off caused the injury. That he was at this particular spot, and was injured by reason of the defective and rotten plank, is sworn to positively by the boy, and the statement is corroborated by circumstances that are convincing, and the mere fact that he had been in the habit of exposing himself to danger on former occasions, or had theretofore placed himself in a position where he might have been injured in the same manner, was not only insufficient to contradict the testimony on that subject offered by plaintiff, but was incompetent for any purpose. Neither the boy's habit nor his bad character constituted a defense to a recovery." In *C. & O. R. Co. v. Riddle's Adm'x*, 72 S. W. 22, 24 Ky. Law Rep. 1687, in an action for negligence resulting in the death of Riddle, evidence was introduced by plaintiff to show that the decedent was a sober man. In discussing the competency of this evidence, this court said: "We do not think it was competent for appellee to introduce any evidence tending to show the general reputation of her decedent

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for sobriety. This evidence would not meet or elucidate the question as to whether or not the decedent was sober at the time he was killed, as a man may generally keep sober, and yet at some particular time in his life be drunk or under the influence of whiskey." These cases are directly in point, and the reason of the rule in rejecting, in cases of this character, evidence of the plaintiffs' habits is supported by both reason and authority. Nearly every person is at times guilty of some negligent act and frequently a person prompted by entirely different motives, and moved by dissimilar influences will do the same thing, and, if evidence of previous similar acts was admitted, the plaintiff should be permitted to explain, if possible, the reasons or the motives prompting him to do each particular act. This would inject into the trial of the case numerous collateral and irrelevant issues and would result in, not only confusing the mind of the jury, but in diverting their attention from the issues presented by the pleadings that they were called on to try. Therefore the lower court properly excluded this evidence.

Appellee was permitted to prove that the cars of the appellant stopped at points on this line other than the place indicated by the sign before mentioned. This evidence was competent to illustrate the fact that appellant had different places at which its cars stopped for patrons to get on and off. Railroad companies have stations at which their trains make regular stops, and there are also points on the road at which there are no stations where they stop for passengers; and if the company authorizes or permits its employees in charge of its trains, or cars, to stop them at other points than those designated on its time-tables or schedule, it is competent to prove the fact, in cases where the evidence throws light on the subject of the investigation; the principal question in this case being whether or not the car stopped at the point where appellee attempted to get on. It was entirely competent and pertinent to the issue to permit evidence showing that appellant's cars did stop at this point: The refusal of the court to permit appellant to prove the propriety and necessity of stopping the cars at regular stopping places, indicated by the sign, was not prejudicial, nor was this evidence relevant to the issue.

Counsel for appellant earnestly insist that the court erred in giving to the jury instruction No. 1. Aside from the instruction defining the measure of damages, the court gave to the jury only two instructions: "(1) If the jury believe from the evidence that the defendant's car was stopped, and that after it was stopped, and while said plaintiff, Allee Herring, was attempting to get on said car, said car was put in motion, and said Herring by reason of said motion fell from said car, the jury should find for the plaintiff. (2) The jury should find for the defendant, unless the jury believe from the evidence that the defendant's car was stopped, and that after it was stopped, and while the plaintiff, Allee Herring, was attempting to get on said car, said car was put in motion, and by reason of said motion said Allee Herring fell from said car." And complained that the court refused to give

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the following instruction asked by it: "Before the jury can find for the plaintiff, they must believe from the evidence that the defendant's car had stopped, and while stationary plaintiff attempted to board the same, and before the plaintiff could secure a seat in said car, or safely board the same, the employees of defendant in charge of said car suddenly started the same, knowing that the plaintiff was endeavoring to board the car, and by reason thereof the plaintiff was thrown to the ground and received her injuries." The only substantial difference between the instructions given and refused is that, in instruction No. 1 that was refused, the liability of appellant only attached in the event its employees in charge of the car started the same when they knew that the plaintiff was endeavoring to board the car. The instruction given to the jury presented with admirable brevity and clearness the only issue in the case, which was whether the car did, or did not, stop. If it did stop, it is very evident that it stopped for the purpose of letting the appellant get on, and, in starting before she got on, appellant was guilty of actionable negligence. If the car did not stop, then appellee in attempting to board it was guilty of such contributory negligence as to defeat a recovery on her part. The instruction presented squarely and sharply to the jury the issue tried out by the parties and made by the pleadings. It is true, as urged by counsel, that under the facts of this case appellant owed no duty whatever to appellee until she had become a passenger by either getting on, or attempting to get on, the car after it had stopped for the purpose of permitting her to board it. Although, generally, and under the rule announced and followed by this court in many cases, it is not negligence per se to attempt to get on or off a moving car, the rule is that a question of negligence in such cases is one of fact for the jury. *Dasie Ford v. Paducah City Ry.*, 96 S. W. —, 29 Ky. L. R. —. But this general rule has no application to this case because of the issue made by the parties, which, we repeat, was whether or not the car stopped.

Counsel also complain of error in the instruction fixing the measure of damage. This instruction reads as follows: "If the jury find for the plaintiff, they should find for her in such sum in damages, not exceeding \$20,000, as will fairly compensate the plaintiff for any injury done her by reason of her fall from said car. In estimating the injury done the plaintiff, if the jury find for the plaintiff, the jury should allow the plaintiff compensation for any pain suffered by her, mental and physical, and such further sum as will fairly compensate her for the loss of her foot." In *L. & N. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905, *South Covington & Cincinnati R. Co. v. Nelson*, 89 S. W. 200, 28 Ky. Law Rep. 287, *L. & N. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280, and in many other cases decided by this court, an instruction similar to the one given in this case has been disapproved, and it was held that the jury should have been instructed that, in estimating the damage plaintiff was entitled to recover, they were confined to such a sum as would fairly compensate her for

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the value of time lost, reasonable expense incurred, and for physical and mental suffering caused by the injury, and for any reduction of her power to earn money. In obedience to the rule announced by this court, and adhered to in many cases, defining the character of instruction that should be given in cases for personal injuries where death does not ensue, we feel constrained to reverse this judgment for the error of the lower court in giving this instruction.

Judgment reversed

BARNUM GRAIN CO. v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, July 26, 1907.)

[112 N. W. Rep. 1030.]

Carriers—Transportation of Goods—Bills of Lading—Negotiability.*—A bill of lading, upon which is stamped the words "not negotiable, unless delivery is to be made to the consignee or order," is exempt from the provision of section 7649, Gen. St. 1894, and the rights of parties thereunder are determined by common-law principles.

Same—Delivery by Carrier—Presentation of Bill of Lading.*—If a railway company, after issuing such a bill of lading, delivers the goods to the consignee named therein, without requiring the bill of lading to be produced, it does so at its peril.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Andrew Holt, Judge.

Action by the Barnum Grain Company against the Great Northern Railway Company. From an order denying a new trial, defendant appeals. Affirmed.

This was an action to recover damages for the conversion of a car load of wheat. The facts were stipulated, and from the stipulation the court found: That during all the times mentioned in the complaint the plaintiff and the defendant were corporations, organized and carrying on the business therein stated. That on and prior to January 10, 1905, at the village of Hampden, N. D., a firm by the name of Iverson Bros. & Anderson were engaged in buying and selling grain. That on said 10th day of January, 1905, this firm delivered to the defendant, as

*For the authorities in this series on the subject of the negotiability and effect of the transfer of bills of lading, see foot-notes appended to *Kentucky Refining Co. v. Bank* (Ky.), 21 R. R. R. 711, 44 Am. & Eng. R. Cas., N. S., 711; foot-notes appended to *Roy & Roy v. Northern Pac. Ry. Co.* (Wash.), 20 R. R. R. 739, 44 Am. & Eng. R. Cas., N. S., 739; *Henderson v. Louisville & N. R. Co.* (La.), 20 R. R. R. 644, 43 Am. & Eng. R. Cas., N. S., 644; foot-notes appended to *General Elec. Co. v. Southern Ry.* (S. Car.), 17 R. R. R. 76, 40 Am. & Eng. R. Cas., N. S., 76, where all the preceding authorities in this series are collected.

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such common carrier, in said village of Hampden, 60,000 pounds of No. 2 northern wheat, which was loaded by defendant into its car No. 77,524, consigned to McKinnon, Sons & Co., at Duluth, Minn. That at the time of so receiving said wheat said defendant duly issued its certain bill of lading therefor, substantially in the following form: "Great Northern Railway Line, Great Northern Railway Company, Hampden Station, January 10, 1905. Received from Iverson Bros. & Anderson, shippers, the property described below in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said Great Northern Railway Company agrees to carry to the said destination, if on its line; otherwise, to deliver to another carrier on the route to said destination. It is mutually agreed that any service to be performed hereunder shall be subject to the terms and conditions of the Great Northern Railway Company's freight tariffs, and to all conditions, whether printed or written, indorsed thereon, and which are hereby agreed to by the shippers and by them accepted for themselves and their assigns as just and reasonable. Initials G. N.; car number 77,524; kind of grain, wheat; weight, 60,000, in apparent good condition. One car of wheat to be transported to Duluth station, subject to elevator delivery on this company's track, consigned to McKinnon, Sons & Co., destination Duluth, loaded to the grain line." That on the face of said bill of lading was stamped in red letters the following clause: "Not negotiable unless delivery is to be made to consignee or order." That said bill of lading was duly issued by the defendant through its authorized agent at said Hampden. That said Iverson Bros. & Anderson drew a draft for \$1,000 upon the consignee, McKinnon, Sons & Co., of Duluth, Minn., and attached the draft to the bill of lading so delivered to them by the defendant, and caused the same to be sent through the First State Bank of Hampden, N. D., and the First National Bank of Minneapolis. That on the 13th day of January, 1905, the consignee, McKinnon, Sons & Co., requested the plaintiff herein to pay the draft with the bill of lading so attached, and agreed to pay any overdraft to the plaintiff if the wheat represented by the bill of lading was not of sufficient value to pay the draft in full. That pursuant to said request plaintiff on the 14th day of January, 1905, paid to the bank at Duluth the draft of \$1,000, and the bank thereupon delivered the bill of lading attached thereto to the plaintiff, and the plaintiff paid the draft in the sum of \$1,000, and received and retained the bill of lading, in the belief that the wheat was being shipped in accordance with the bill of lading, and that it still holds the same, and has not been repaid said \$1,000. That the defendant never delivered the wheat, or any part thereof, to plaintiff, although plaintiff has duly demanded the same; but the defendant has always refused, and still refuses, to deliver the wheat, or any part thereof, to plaintiff, or any part of the draft so paid by plaintiff. That said car of wheat in the regular

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course of transportation would have arrived at the city of Duluth on the 20th day of January, 1905, and was worth in said city at that time more than \$1,012.

It is further found: That upon the 13th day of January, 1905, said shippers, Iverson Bros. & Anderson, after said bill of lading with the said draft attached had been deposited by them in said First State Bank of Hampden, requested the agent of the defendant to divert said car from Duluth to Minneapolis. That said defendant complied with said request and shipped said car to Minneapolis, instead of Duluth, without requiring said bill of lading to be returned or exchanged; and the defendant thereupon did not carry said wheat to Duluth, but carried the same to Minneapolis and delivered the same to E. L. Welch & Co. on the 20th day of January, 1905, under a general order given it by McKinnon, Sons & Co. to deliver all grain shipped to the latter to said E. L. Welch & Co. at Minneapolis. That during said time said McKinnon, Sons & Co. had offices in both cities of Minneapolis and Duluth and did business in each of said cities; and on said 20th day of January, 1905, said McKinnon, Sons & Co. sold said wheat upon commission through the said E. L. Welch & Co., and rendered an account to said Iverson Bros. & Anderson on the 16th day of February, 1906. It is further found: That on the 14th day of January, 1905, the said shippers, Iverson Bros. & Anderson, notified the said consignees, McKinnon, Sons & Co., at Minneapolis, that the destination of said wheat had been changed from Duluth to Minneapolis; but said plaintiff was not informed by said McKinnon, Sons & Co. of such change in the place of destination of said wheat and had no knowledge whatever thereof. That on the 13th day of January, 1905, said Iverson Bros. & Anderson did notify said First State Bank of Hampden of the change in destination of said grain from the city of Duluth to the city of Minneapolis, and said Iverson Bros. & Anderson at the time of making said draft did notify said First State Bank of Hampden to send said draft to Minneapolis, to be there presented to said McKinnon, Sons & Co., and that such notification was made in pursuance of a notice received from said McKinnon, Sons & Co. some time prior to said 10th day of January, 1905, that all drafts should be sent to Minneapolis and there presented to said McKinnon, Sons & Co., whether shipments of grain were made to Duluth or Minneapolis; but that the said Barnum Grain Company had no notice or knowledge of the notification given by said Iverson Bros. & Anderson on the 14th day of January, 1905, of change in the destination of said grain, or notification to send said draft to Minneapolis to be there presented to said McKinnon, Sons & Co., except such notices, if any, as would be charged to said Barnum Grain Company from such as were given to the First State Bank of Hampden or to said defendant at the time of making the change as aforesaid, or to said McKinnon, Sons & Co.; nor was said plaintiff informed by said McKinnon, Sons & Co. of the notification by said Iverson Bros. & Anderson that

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all drafts should be sent to Minneapolis and there presented to said McKinnon, Sons & Co.; nor did defendant, prior to the time of paying said draft by plaintiff, inform plaintiff itself of such change of destination.

Upon these facts the court ordered judgment against the defendant for the sum of \$1,000, with interest thereon from January 20, 1905.

Rome G. Brown, and Charles S. Albert, for appellant.

Wilson & Mercer, for respondent.

ELLIOTT, J. (after stating the facts). The various assignments of errors are grouped by the appellant so as to raise three questions:

1. It is contended that the bill of lading was not negotiable, and that therefore the railway company had the right to deliver the wheat to the consignee named in the bill of lading without requiring the production of the bill of lading. The nature and effect of a bill of lading, independent of the statute, is well settled in this state. *Ratzer v. B., C. R. & N. Ry. Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; *Ryan v. Great Northern Ry. Co.*, 90 Minn. 12, 95 N. W. 758. The statute (section 7649, Gen. St. 1894) provides: "Warehouse receipts, given for any goods, wares and merchandise, grain, flour, produce or other commodity, stored or deposited with any warehouseman, or other person or corporation in this state, or bills of lading, or receipt for the same, when in transit by cars or vessels to any such warehouseman or other person, shall be negotiable, and may be transferred by endorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred, shall be deemed and taken to be the owner of the goods, wares or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon: provided, that all warehouse receipts, or bills of lading, which shall have the words 'not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act." In *National Bank of Commerce v. Chicago, B. & N. Ry. Co.*, 44 Minn. 224-236, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, it was held that this statute did not make bills of lading negotiable in the sense of the law merchant. "The statute," said the court, "was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself." *Shaw v. Railway Co.*, 101 U. S. 557, 25 L. Ed. 892; *Turner v. Israel*, 64 Ark. 244, 41 S. W. 806.

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The statute thus merely declares the effect which shall be given to the transfer of a bill of lading. It provides, however, "that all warehouse receipts, or bills of lading, which shall have the words 'not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act." The bill of lading in question had plainly stamped across its face the words: "Not negotiable unless delivery is to be made to the consignee or order." It follows that, according to the express language of the statute, this bill of lading is exempt from the provisions of the statute, and is therefore governed by the general principles of the common law applicable to such instruments. In *Midland National Bank v. Missouri Pacific Ry. Co.*, 62 Mo. App. 531, the court said: "The words 'not negotiable,' stamped on the face of the bills of lading, in no wise destroyed their assignability. The sole effect of these words was to exempt such bills of lading from the provisions of our statute in relation thereto." The bill of lading in question was assignable by delivery, and, notwithstanding the fact that it was stamped not negotiable, represented the goods which had been shipped. The transfer of the bill did not transfer the contract. It transferred the goods represented by it. *Cox v. Central Vermont Ry. Co.*, 107 Mass. 129; *Falkenburg v. Clark*, 11 R. L. 278; *Munro v. Philadelphia Warehouse Co.* (C. C.) 75 Fed. 545; *Pollard v. Reardon*, 65 Fed. 848, 13 C. C. A. 171. The case is therefore controlled by the previous decisions of this court. *Ratzer v. Railway Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; *Ryan v. Great Northern Ry. Co.*, 90 Minn. 12, 95 N. W. 758.

The appellant claims that the Barnum Grain Company was acting merely as the agent of McKinnon, Sons & Co., and rests this claim upon a letter written by the Barnum Grain Company to the railway company, in which it is stated that "this car, without any authority from us, was diverted in transit by McKinnon, Sons & Co. to Minneapolis; we, as their agents in Duluth, having paid the draft with the original bill of lading attached for \$1,000." The defendant below asked the trial court to find from the stipulated facts that the Barnum Grain Company was acting as the agent of McKinnon, Sons & Co., and not otherwise. This the court declined to do, because in its judgment the evidence, as stipulated, did not justify such a finding. Taking the evidence as a whole, and considering it in the light of the entire transaction and the customs of business, of which the court will take judicial notice, we cannot say that the refusal to make this finding was error. The plaintiff had sufficient interest in the wheat to enable it to bring this action.

The order denying a new trial is therefore affirmed.

MISSOURI PAC. RY. CO. v. PERU-VAN ZANDT IMPLEMENT CO.

(Supreme Court of Kansas, March 10, 1906.)

[85 Pac. Rep. 408.]

Carriers—Delay in Shipment—Action by Consignee.—When property has been consigned by the general owner to an agent, who has a special interest therein as factor, or commission agent, and the goods so consigned are negligently delayed in transit and converted by the carrier, so that sales thereof previously made by the consignee are canceled and lost, such consignee may maintain an action in its own name against the carrier for the recovery of damages on account of such lost commission, and also for the value of the property converted.

Same—Payment of Freight—Conversion.*—When a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceed the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of freight, and a refusal by the carrier to surrender possession upon such demand is wrongful and amounts to a conversion.

Same—Delay in Delivery—Notice of Effect.†—Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. They will be held to a knowledge of seed time and harvest and the general customs relating thereto in the territory where they do business. A common carrier, that on June 12, 1903, received at the factory in Port Huron, Mich., threshing machines, consigned to an implement dealer of Hutchinson, Kan., to be delivered at Larned, Kan., with stopover, to partly unload at Seward, Kan., will be deemed to have notice that such machines are for immediate sale, if not already sold, and that a delay of delivery until the entire threshing season has passed will defeat the purpose of shipment.

Same—Measure of Damages.‡—An action was brought against a common carrier by the consignee of threshing machines. On the

*For the authorities in this series on the question, what constitutes conversion of freight by the carrier, see foot-notes appended to Southern Ry. Co. v. Webb (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26.

†For the authorities in this series on the question, what delays will render the carrier liable for loss or injury to freight, see foot-notes appended to Alabama Great So. R. Co. v. Quarles & Couturie (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69; Mauldin v. Seaboard Air Line Ry. (S. Car.), 19 R. R. R. 76, 42 Am. & Eng. R. Cas., N. S., 76; General Fire Ext. Co. v. Carolina & N. W. Ry. Co. (N. Car.), 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336.

‡For the authorities in this series on the question, what damages are recoverable for loss, or injury to, or delay in delivering freight, see foot-notes appended to Southern Ry. Co. v. Webb (Ala.), 20 R. R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26; foot-notes appended to Weston v. Boston & M. R. R. (Mass.), 19 R. R. R. 718, 42 Am. & Eng.

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trial it appeared that the plaintiff had sold the machines as agent for the consignor, and was entitled to receive out of the proceeds of the sale a commission of 40 per cent. of the price for which the sale was made. It also appeared that the carrier negligently delayed the delivery of the goods until the sales were for that reason canceled, and the commission thereby lost. It further appeared that the carrier converted the machinery to its own use. An action was brought to recover for the loss of commission and the value of the property converted. Held, that the price for which the sale had been made was the proper measure of damages in such action.

(Syllabus by the Court.)

Error from District Court, Reno County; P. J. Galle, Judge.

Action by the Peru-Van Zandt Implement Company against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The Port Huron Engine & Thresher Company, of Port Huron, Mich., manufactures threshing machines and sells them throughout the country through local agents. The plaintiff, defendant in error, is its agent at Hutchinson, Kan. By the contract of agency, it is the duty of the Peru-Van Zandt Implement Company, to advertise, introduce, and sell the machines to those desiring to purchase, and, when a sale is made, an order is taken from the purchaser, in writing, directing the Port Huron Company to ship the machinery desired, stating price, manner of payment, and other particulars constituting the conditions of sale, which order is signed by the purchaser and delivered to the local agent. This order is forwarded to the Port Huron Company by the agent making the sale. Upon this order the machinery is shipped by the designated route consigned to the local agent. It is the duty of the agent to receive the machinery and hold possession thereof until payment is made or secured as stipulated in the order of the buyer. In completing the sale the agent takes in payment cash, notes, mortgages, or other security as directed, but delivers the machinery only after the sale has been approved by the Port Huron Company. Until such approval and delivery, the title to the machinery does not pass from the seller. The Peru-Van Zandt Company receives for its service in making such sales a commission of 40 per cent. of the selling price. If any machinery is taken back, or returned, the local agent takes charge thereof and may resell it, and receive a commission therefor. The local agent pays all expenses incident to the sales made. The buyer pays the freight, in addition to the price stip-

R. Cas., N. S., 718; *Wesner & White Mfg. Co. v. Atlantic Coast Line R. Co. (S. Car.)*, 19 R. R. R. 342, 42 Am. & Eng. R. Cas., N. S., 342; foot-notes appended to *Wall v. Atlantic Coast Line R. R. (S. Car.)*, 19 R. R. R. 332, 42 Am. & Eng. R. Cas., N. S., 332; foot-note appended to *Chicago, B. & Q. Ry. Co. v. Todd (Neb.)*, 19 R. R. R. 113, 42 Am. & Eng. R. Cas., N. S., 113; *Bourland v. Choctaw, etc., Ry. Co. (Tex.)*, 19 R. R. R. 61, 42 Am. & Eng. R. Cas., N. S., 61; foot-note appended to *Central of Georgia Ry. Co. v. Chicago Port Co. (Ga.)*, 18 R. R. R. 85, 41 Am. & Eng. R. Cas., N. S., 85.

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ulated for the machinery. Where payment is made by the purchaser with notes, collection is made by the agents, and out of the proceeds, the commission is deducted. The commission always comes out of the proceeds of each sale when collected. The Peru-Van Zandt Company, under this employment, sold two machines for the aggregate sum of \$920, and took from the purchasers written orders therefor, which were duly forwarded to the Port Huron Company. Upon receipt of the orders, the machines were shipped over the road of the plaintiff in error, consigned to the Peru-Van Zandt Implement Company, at Larned, Kan., with stopover to partly unload at Seward, Kan., being the points where the purchasers lived. The bill of lading contained nothing to indicate the relation existing between the consignor, the Port Huron Company, and the consignee, whether that of vendor and vendee, or principal and agent. The machines were shipped June 12, 1903, and in ordinary course would have arrived at destination within 10 days, but on account of negligent delays they did not arrive until some time in the month of August, long after the threshing season had closed and the sale contracts had, for that reason, been canceled. By the contract of shipment, the freight was payable before delivery of machinery to consignee. The consignee declined to pay the freight, claiming that the damages suffered on account of delay far exceeded the amount of the freight bill. The carrier refused to deliver the goods until the freight was paid. Thereupon the defendant in error demanded that the machinery be delivered to it without payment of freight, and, upon refusal, commenced this suit. The demand was made in the name of the Port Huron Company, by the Peru-Van Zandt Company as agent. The petition alleges that the plaintiff is the agent and factor of the Port Huron Company, and avers the facts constituting their relationship, substantially as hereinbefore set forth. In the first cause of action the plaintiff asks judgment for the amount of commission lost by it, and in the second cause of action it demanded judgment for the value of the machines. The carrier retained, and still keeps, possession of the machines. The plaintiff recovered judgment for the price for which the machines were sold. Plaintiff in error brings the case here for review.

Priggs & Williams, J. H. Richards, and C. E. Benton, for plaintiff in error.

Geo. A. Vandever and F. L. Martin, for defendant in error.

GRAVES, J. (after stating the facts). Many assignments of error have been presented, but they are substantially covered by three: (1) It is insisted that the plaintiff has no interest in the machinery in controversy, and, therefore, cannot maintain an action for its conversion; (2) that the proper measure of damages in cases of a recovery is the difference between the market value of the machinery at the time and place of delivery, and the market value thereof when it in fact arrived at such place: (3) that damages for loss of commission cannot be recovered,

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because a sale of the property was not within the contemplation of the parties when shipment was made.

Concerning the first proposition, there is considerable confusion among the authorities as to whether the consignee or consignor is the proper party plaintiff in an action against a carrier, but the rule that a suit for the conversion of goods must be brought by the owner, or one having a beneficial interest in the property converted, seems to be fairly well established. Hutchinson on Carriers, §§ 731-734; 6 Cyc. 510; Woods' Brown on Carriers, § 599. The consignee is always presumed to possess the necessary ownership, until the contrary is shown. Ray on Carriers of Freight, p. 1006; Griffiths v. Ingledew, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444; Smith v. Lewis, 3 B. Mon. (Ky.) 229; Arbuckle v. Thompson, 37 Pa. S. 170; Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253. The ownership need not be extensive. An agent, factor, broker, bailee or other person having rights in the property to be protected, may maintain an action, and recover both for himself and the general owner. Chamberlain v. West, 37 Minn. 54, 33 N. W. 114; Harrington v. King, 121 Mass. 269; Firm v. Railroad, 112 Mass. 524, 17 Am. Rep. 128; Green v. Clarke, 12 N. Y. 343; Railroad v. Mower, 76 Me. 251.

We think the plaintiff in this case had sufficient interest in the property to enable it to maintain this action. In Railroad v. Mower, *supra*, a case very similar to this, the court said: "Ordinarily, when a plaintiff sustains his action, it is presumed that the whole amount of damages recovered will belong to him. In fact, the injury to him or to his property is the measure of the damages. But, while this is the general rule, there are exceptions, not to the extent or measure of damages, but to the interest the plaintiff may have in them. It is true that an action cannot be maintained unless the plaintiff has an interest in the subject-matter of the suit, but he may do so when he is not interested to the full extent of the damages to be recovered. Such are the familiar cases of injury to property in which there is a general and special owner, as bailor and bailee, consignor and consignee, principal and factor. In such cases the action may not be brought in the names of the two jointly, but may in the name of either. In the action now in question the subject-matter was mowing machines, and parts of mowing machines. The damage claimed rests upon a neglect of the carrier by which the property was improperly delayed in its transit. The facts show that the title to the property was in the mower company; that it had consigned and forwarded the machines to Dunham by virtue of a contract under which Dunham was to sell them for a specified commission and account to the company for them at a specified price. Dunham was also to pay the freight. This contract, while it did not change the title in the machines and pieces, gave Dunham such a special property in them as to enable him to maintain the action in his own name, and the consignment and forwarding the property, thus setting it apart and putting it into the hands

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of the carrier for his benefit, gave him a constructive possession sufficient for that purpose; and as the injury was the result of a single wrongful act to the whole property the damage could not be apportioned but must all be recovered in that one action, the judgment in which would be conclusive against any suit by the general owner. Hence, Dunham, in his suit, is entitled to recover, not only his own damages, but such as have accrued to the mower company as general owners. The measure of damages as held by the court in that case can be applicable upon no other theory. If then Dunham should receive the whole damage recoverable in his suit he would be entitled to retain his own share, and the balance he would hold as trustee for the mower company." In the case of *Express Co. v. Armstead*, 50 Ala. 352, it is said: "The consignee of goods has a right to sue for their loss by the carrier, notwithstanding another party may be the owner of them. The obligation is to deliver to him. Generally the property vests in him by the mere delivery to the carrier. Although the absolute or general owner of personal property may support an action for any injury thereto, if he have the right of immediate possession, this does not necessarily divest the right of the consignee to sue, notwithstanding he has never had the actual possession."

A judgment in favor of the plaintiff can work no harm, as it is a bar to an action for the same injury by the Port Huron Company. *White v. Bascome*, 28 Vt. 268; *Green v. Clarke*, *supra*; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Little v. Fossett*, 34 Me. 545, 56 Am. Dec. 671. The plaintiff holds in trust for the Port Huron Company, whatever remains of the amount recovered, after payment of its commission. *Chamberlain v. West*, *Finn v. Railroad*, *White v. Bascome*, and *Little v. Fossett*, *supra*. A consignee has a right to withhold freight bill when its damages exceed that amount, and in such a case the refusal of the carrier to deliver the goods until the freight is paid amounts to a conversion. 5 A. & Eng. Enc. of Law (2d Ed.) 232; *Miami Powder Co. v. Port Royal, etc.*, (S. C.) 16 S. E. 339, 21 L. R. A. 123; 6 Cyc. 497; *Railroad v. Goodholm*, 61 Kan. 758, 60 Pac. 1066. The measure of damages is compensation for the injury sustained. An amount which will place the injured party in the same condition he would have occupied, if no loss had occurred, will satisfy this requirement. If in this case the machinery had been delivered according to contract, the price for which it had been sold would have been realized. Out of this amount the commission due the plaintiff would have been deducted. The freight would have been paid by the purchasers of the machinery. The selling price at place of delivery seems, therefore, to be the true measure of damages. We think the amount recovered in the district court fairly compensates all parties for the losses sustained. Out of this amount the plaintiff will retain a sum equal to the commission lost, and must account to the Port Huron Company for the remainder.

Finally, it is insisted, that a sale of the machinery was not

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within the contemplation of the parties at the time of shipment, and therefore commission is not a proper element of damages. A railroad company must be held to know facts familiar to ordinary people. It is fair to assume that a carrier of threshing machines knows what they are used for and that the only purpose implement dealers have for shipping such property into the heart of a great wheat country is to sell it. When a shipment of threshing machines is made in June of any year, the inference follows that, if they are not already sold, an immediate sale is intended. We think, therefore, that the loss of commission is not so remote as to be excluded as an element of damage in this case. The general rule that damages caused by the loss of a sale, not within the contemplation of the parties, cannot be received, has no application to the facts here shown.

No error appearing, the judgment of the district court is affirmed. All the Justices concurring.

SOUTHERN RY. CO. IN KENTUCKY v. SMITH.

(Court of Appeals of Kentucky, May 10, 1907.)

[102 S. W. Rep. 232.]

Carriers—Carriers of Freight—Liability.*—A carrier received freight for transportation, though it had no trains scheduled to carry it until the following day. The shipper knew the facts, and understood that the goods would be stored in the depot until the following day. Held, that the carrier while holding the goods at the depot was liable as a carrier, and not as a warehouseman.

Trial—Right to Open and Close.—Where, in an action against a carrier for the loss of freight, the answer controverted the allegations of the petition, and alleged the loss was through an act of God, and the reply denied the affirmative allegations, and the carrier, after the jury had been sworn, filed an amended answer, in which it withdrew the denials of the answer, except those as to the value of the goods, the court properly refused its motion to adjudge it the burden of proof, and the concluding argument to the jury.

Carriers—Carriage of Freight—Liability for Loss—Act of God.†—To exempt a carrier from liability for loss of goods by reason of an act of God, it must be free from negligence.

Same—Question for Jury.—In an action against a carrier for loss

*For the authorities in this series on the question, when does a common carrier's liability as such begin, see foot-notes appended to *Nelson v. Chicago, etc., Ry. Co.* (Neb.), 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613; foot-notes appended to *Chicago, etc., R. Co. v. Powers* (Neb.), 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286.

†See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

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of goods stored in a depot, awaiting transportation, evidence examined, and held that the question whether the loss was the result of an act of God, relieving the carrier from liability, was for the jury.

Appeal from Circuit Court, Woodford County.

"To be officially reported."

Action by Viola M. Smith against the Southern Railway Company in Kentucky. From a judgment for plaintiff, defendant appeals. Affirmed.

Wallace & Harris and *Humphrey & Humphrey*, for appellant.
Field McLeod, for appellee.

HOBSON, J. On the afternoon of August 22, 1905, Viola M. Smith delivered to the Southern Railway Company in Kentucky at its depot in Versailles a piano, two chairs, and three boxes of goods, for shipment to Ocean Park, Cal. No freight train to take the goods passed that afternoon, and that night the depot, with the goods in it, was burned. She brought this suit to recover against the company \$2,000, the alleged value of the goods. The case was tried before a jury, who found a verdict for her in the sum of \$1,500. The court entered judgment upon the verdict, and the railroad company appeals.

By its answer the railroad company pleaded as a defense to the action, that it had no train that could carry the freight scheduled to pass through Versailles after the freight had been delivered to it until about 9 a. m. of August 23d; that this was well known to the plaintiff when she delivered the freight, and that she understood that the goods were to be stored in the depot that night and loaded on the cars the next day; that in consequence of these facts it did not become liable to her as a common carrier, but was only liable as a warehouseman for the goods. The court struck out this part of the answer, and of this the railroad company complains. In 6 Cyc. 453, the rule is thus stated: "Where the goods are delivered to the carrier for immediate transportation, and nothing remains to be done by the shipper, the liability of the carrier as carrier attaches at once. And even while detained in the carrier's warehouse in the usual course of business, or for the carrier's convenience, the liability of the carrier is not that of warehouseman, but that of carrier proper." See also, 5 Thompson on Negligence, § 6441, and cases cited. The court, therefore, properly struck out this part of the answer. The original answer controverted the allegations of the petition, and also pleaded affirmatively that while the goods were in the depot, it was destroyed by fire, caused by lightning during an electrical storm, and without any fault or negligence on the part of the defendant. By the reply the affirmative allegations of the answer were denied. After the jury had been sworn, and the case stated to the jury, the defendant filed an amended answer in which it withdrew all the denials of the answer except those as to the value of the goods, and then moved the court to adjudge it the burden of proof and the concluding argument to

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the jury. This the court properly refused to do. The trial had begun, and a party should not be allowed to amend his pleadings on the trial simply for the purpose of getting the advantage of the last speech to the jury. The court might properly have refused to allow the amended answer to be filed, but when it became apparent to him for what purpose it was filed, he properly refused to allow any advantage to be taken of it. Amendments of pleadings, especially after the trial has begun, are only to be allowed in furtherance of justice, and should never be allowed for the purpose of merely changing the order of argument. It is unnecessary, therefore, for us to determine whether under the answer as amended the defendant was entitled to the burden and the concluding argument.

The proof of the defendant on the trial showed that on the night of August 22d there was a severe electrical storm at Versailles. It began raining something after midnight, and between 3 and 4 o'clock the lightning was very vivid and frequent. About the close of the storm there were two flashes of lightning, followed instantly by thunder. One of these was on one side of the town, and the other in the neighborhood of the depot. Two witnesses testify to being up and seeing the flash of lightning. Both testify that it seemed to strike not far off, and in the direction of the depot. They did not, either of them, however, think of the depot at the time, and both went back to bed. A witness, who was watching a locomotive in the yards of another company not far from the depot in question, also testified to seeing the flash over in the direction of the other depot, and that a short time afterwards he looked over that way, and saw the smoke from the burning building. He puts the time that had elapsed at five minutes, but he had no timepiece. He was in his engine when the flash came, and he did not go out until he went out to get some coal for his engine when the rain held up. About 200 yards from the station a telegraph pole was struck by lightning and badly shattered, and two other poles beyond it were also shattered. From these poles the telegraph wires ran into the depot, reaching the depot at its east end, and passing along the eaves until they were brought into the office. The first witness who got to the building testified that the east end of the depot was on fire, and that the main bulk of the fire seemed to be in the corner. At that time the house was burning all the way from the floor to the roof. Another witness speaks of the fire being up about the eaves along where the telegraph wires ran. None of the witnesses are very definite as to the time when the violent flash of lightning came, or how long had elapsed after this before they got to the station and saw it afire as above described. But their description of the fire and the extent to which the building was involved would indicate that the fire had been in the building some time, certainly much longer than five minutes. There had been no fire in the building for some time. The men who worked there had all left before dark, and they had had no lights in it that night. There is no proof by any one of any signs about the

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building that it had been struck by electricity. The evidence of the witnesses would rather tend to make the impression that the building was not struck by electricity, as they saw no signs of it. In addition to this, there seems to have been only one flash of lightning which struck in this neighborhood, and that evidently struck the telegraph poles. If the building was set afire by electricity which was conveyed into the building by the telegraph wires, the fire probably would have been communicated at a point where there was a lack of insulation. If the wire had been properly grounded and properly insulated the lightning would perhaps have passed off into the ground without doing any damage; and if the lightning was carried into the building by defendant's own wires, the burden was upon it to show that it was not at fault in properly insulating its wires. The carrier is answerable for a loss unless caused by the act of God or the public enemy. The act of God includes the forces of nature, such as lightning, earthquakes, and the like. But to exempt a carrier from liability by reason of any of these things, he must be free from negligence. In 5 Thompson on Negligence, § 6456, the rule is stated: "Loss by the act of God may be said to include all losses resulting immediately from natural causes without the intervention of man, and which cannot be foreseen and prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ."

The manner in which this house was burning when discovered indicates to some extent that it had caught afire on the inside, and was burning up from the floor; at least there were facts from which the jury might have concluded this. There was also proof from which it might be concluded that something like an hour had elapsed after the flash of lightning before the building was seen in flames. Buildings are sometimes robbed and then set afire. The proof in this case leaves the mind in doubt as to how this fire originated. It is possible that the fire was caused by the lightning. From some of the evidence this seems very probable. Still, taking the testimony as a whole, we cannot say that there was no evidence to go to the jury, or that their verdict should be set aside. The court squarely and fairly submitted to the jury the question whether the fire was caused by the lightning, and by their verdict they, in effect, said that it was not. The carrier is responsible for the loss unless he shows that it occurred from a cause for which he is not liable, and where the evidence is at all doubtful or conflicting the question is for the jury, and their verdict should not be set aside where the evidence is wholly circumstantial, and the circumstances relied on are not conclusive; for a jury of 12 men are peculiarly qualified to pass on a question of this sort. On the whole case we have reached the conclusion that the question here was one of fact, and that the verdict of the jury should not be disturbed.

Judgment affirmed.

ALABAMA GREAT SOUTHERN R. CO. v. J. A. ELLIOTT & SON.

(Supreme Court of Alabama, April 20, 1907.)

[43 So. Rep. 738.]

Carriers — Carriage of Goods — Delay in Transportation — Loss Through Act of God—Liability of Carrier.*—A consignment of flour was delivered to a carrier for shipment. It was retained four days before being forwarded. Upon the day of its arrival at its destination, at 1 o'clock p. m., notice of its arrival was sent to the consignee. On the morning of the next day, at 1 o'clock, a cyclone damaged the goods. Held, that the carrier was liable for the damage, since its negligence, resulting in the delay at the place of shipment, continued to be an active cause until the consignee had a reasonable time after their arrival within which to remove the goods.

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

Action by J. A. Elliott & Son against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. E. Waller and De Graffenreid & Evans, for appellant.
Thomas E. Knight, for appellee.

SIMPSON, J. This was an action for damages resulting from the failure to deliver part of a certain lot of flour and delivering another portion of the same in a damaged condition. The assignments of error relate entirely to the ruling of the court on certain demurrers to pleas, and the facts, as set out in the pleading, are that the flour was delivered to the Louisville & Nashville Railroad Company at Evansville, Ind., to be carried to the plaintiff at Moundville, Ala., a place of about 150 inhabitants, on the line of the defendant company. Said flour was delivered to the defendant company, at Birmingham, Ala., on the 17th day of January, 1904, and by it shipped out from Birmingham on the 21st day of January. It reached Moundville, in the same condition as received, on said 21st day of January, at 1 o'clock p. m., and notice was sent to the plaintiff of its arrival; but on the morning of the 22d of January, at 1 o'clock, a violent cyclone swept over the country and caused the damage complained of.

The only question presented by the assignments and briefs of counsel, is whether or not, admitting the delay at Birmingham, the defendant is liable on account of the damage done by the act of God, to wit, the cyclone, at Moundville, 12 hours after the goods reached said destination. In a recent case before this court, where the carrier to which the goods were delivered for shipment retained the same in its possession, without shipment,

*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

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for a period of 11 days, and on the eleventh day said goods were practically destroyed by a cyclone, this court, recognizing the fact that there is a serious conflict in the decisions of other states, placed itself in the column of those holding the carrier liable. *Ala. Great So. R. Co. v. Quarles & Couturie* (Ala.) 40 South. 120, 5 L. R. A. (N. S.) 867. It will be noticed that the facts in this case are not identical with those in the case just cited, in that, in that case, the cyclone occurred while the carrier was in default, to wit, during the delay, so that the delay and the cyclone were concurring causes. This court said: "When there is an unreasonable delay on the part of the carrier in forwarding the goods, and they are destroyed by the act of God during this delay, he is not excused, for the reason that it was by his fault that they were exposed to the peril. Page 121, column 2, of 40 South. (5 L. R. A. [N. S.] 867). Again, in commenting on a Massachusetts case holding otherwise, though not considered strictly analgous, we said: "It cannot be held to have approved the proposition that a defendant, when liable as an insurer, being at fault at the time of the act of God caused the loss, could invoke that act as a defense." Page 122, column 1, 40 South. (5 L. R. A. [N. S.] 867). In the case of *L. & N. R. R. Co. v. Gidley*, 119 Ala. 523, 24 South. 753, also, the leather was destroyed by fire while it was being unlawfully detained in the warehouse of defendant. Also, in the leading case on the side of liability, the goods were overtaken by a flood while being improperly detained at Albany. *Michaels v. N. Y. C. R. R.*, 30 N. Y. 564, 86 Am. Dec. 415. The recent case of *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 69 L. R. A. 509, 94 Minn. 269, 102 N. W. 709, 110 Am. St. Rep. 361, holding in line with our decision, also emphasizes the fact, stating: "The rule that permits a carrier to excuse his negligence by an act of God, overtaking him while thus in fault, seems to us unsound." Page 512, column 2, of 69 L. R. A., page 275 of 94 Minn., page 711 of 102 N. W. (110 Am. St. Rep. 361). Also: "If a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable." Page 512, column 2, of 69 L. R. A., page 276 of 94 Minn., page 712 of 102 N. W. (110 Am. St. Rep. 361). So, in the case of *Wald v. Pittsburg, etc., R. R. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332, where the passenger's trunk, in place of being sent on the train with him, was detained and sent on another, which was caught in the Johnstown flood, this was treated as a deviation, and, as the act of God occurred during the deviation, the company was held responsible. Page 338 of 53 Am. St. Rep. In the case of *So. Pac. Co. v. Boothe et al.* (Tex. Civ. App.) 39 S. W. 585, the goods were transported by a different route from that over which they were shipped, and in consequence of the deviation the consignee failed to receive notice of their arrival. The plaintiff sued in trover (the carrier having sold the goods because of the refusal of the consignee to receive them). The court denied the recovery, holding that the consignee should re-

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ceive them, and would have been entitled to recover compensation for the difference in the value between the time when he should have received the notice and the time when he did receive it. In the case of *Mich. C. R. R. Co. v. Curtis*, 80 Ill. 324, the fruit trees were shipped from Rochester, through Chicago, to various points beyond, were delayed about 11 days at Chicago, and were frozen when received. The railroad company was held liable, the court saying: "They did not have the right to delay unreasonably the delivery of the trees, until they would inevitably be destroyed in the hands of the next carrier, and then be heard to say that they were destroyed in the hands of the company into whose hands they passed them for ultimate delivery" (page 327); also that "the jury were fully warranted in finding that it occurred (that is, the freezing) in Chicago, or at least in part, before leaving there," etc. (page 330). So it will be seen that this case is not analogous to the present one, as the freezing was a natural cause which might have been anticipated, and the jury were authorized to find that it actually occurred during the delay. It certainly did occur during the transportation. In the third edition of *Hutchinson on Carriers* numerous cases, pro and con, on the question of liability in this class of cases, are cited, including our own case of *Ala. Great Southern Railroad Co. v. Quarles & Couturie* (see sections 297-308, inclusive), and in all of those holding the carrier liable the act of God occurred while the delay "continued and was operative," so that the two were concurrent causes.

The appellant insists that under the influence of this class of decisions, the negligence having passed, the same could not be said to concur with the act of God. This court holds that the negligence, resulting in the delay at Birmingham, continued to be an active cause until the plaintiff had had a reasonable time, after the arrival, within which to remove the goods. Hence the causes were concurring, and the defendant cannot claim that the cyclone was the only proximate cause.

The judgment of the court is affirmed.

TYSON, C. J., and HARALSON and DENSON, JJ., concur.

LOUISVILLE & N. R. Co. *v.* COTTENGIM.

(Court of Appeals of Kentucky, Sept. 25, 1907.)

[104 S. W. Rep. 280.]

Carriers—Carriage of Passengers—Who Are Passengers—Tender of Fare.*—One who fails to provide himself with a ticket before entering a car, or who fails to tender enough money to pay fare when requested, is a trespasser, and not a passenger.

Same—Fares—Sufficiency of Tender.†—While tendering more than the correct amount of car fare without demanding change, is a good tender, it is not good if coupled with a demand for change as a condition precedent to giving up the money.

Same—Offer to Pay When About to be Removed.†—Plaintiff, riding on train without a ticket, exhibited more than the amount of fare, but insisted on receiving his change before paying, and refused to give up the money on an offer of the conductor to accept it and then give back the change. The conductor and another employee started to remove him, when he told them to stop, and he would pay his

*For the authorities in this series on the subject of the existence of the relation of carrier and passenger as affected by the failure to purchase ticket or pay the fare, see *Williamson v. Central of Georgia Ry. Co.* (Ga.), 23 R. R. R. 57, 46 Am. & Eng. R. Cas., N. S., 57 (person without ticket allowed by conductor to board train and pay cash fare); *Indianapolis Trac. & Term. Co. v. Klentschy* (Ind.), 23 R. R. R. 64, 46 Am. & Eng. R. Cas., N. S., 64 (members of women's convention riding on street car without paying fare, by invitation of railway); *Bradburn v. Whatcom County Ry. & Light Co.* (Wash.), 22 R. R. R. 782, 45 Am. & Eng. R. Cas., N. S., 782 (police officer injured while being carried free, in compliance with ordinance; street railway was liable though ordinance was in conflict with provision of the state Constitution); *Purple v. Union Pac. R. Co.* (C. C. A.), 3 R. R. R. 711, 26 Am. & Eng. R. Cas., N. S., 711 (one entering train with understanding with conductor not to pay fare was a trespasser); *Fitzmaurice v. New York, etc., R. Co.* (Mass.), 20 R. R. R. 635, 43 Am. & Eng. R. Cas., N. S., 635 (one riding on ticket procured at reduced rate by false representations to the effect that she was a student at a certain school was not a passenger); *St. Louis & S. F. R. Co. v. Kilpatrick* (Ark.), 17 Am. & Eng. R. Cas., N. S., 212 (purchase of ticket not prerequisite to relation of passenger, under Arkansas Statute); *Innes v. Boston, R. B. & L. Co.* (Mass.), 9 Am. & Eng. R. Cas., N. S., 819 (whether purchase of ticket or ability to pay fare is necessary to constitute one a passenger); note, 20 Am. & Eng. R. Cas., N. S., 121.

†For the authorities in this series on the subject of tender of fare, see *Knoxville Traction Co. v. Wilkerson* (Tenn.), 22 R. R. R. 763, 45 Am. & Eng. R. Cas., N. S., 763 (making charge for street car passengers; power of carrier to fix limit); *Mobile St. Ry. Co. v. Waters* (Ala.), 6 R. R. R. 184, 29 Am. & Eng. R. Cas., N. S., 184 (sufficiency of evidence that coin tendered as fare was of legal tender quality; and worn money as legal tender); *Louisville & N. R. Co. v. Breckinridge* (Ky.), 3 Am. & Eng. R. Cas., N. S., 428 (tender of fare after expulsion); *Marker v. Central Park, N. & E. R. Co.* (N. Y.), 6 Am. & Eng. R. Cas., N. S., 686 (tender of large amount); *Holt v. Hannibal & St. J. Ry. Co.* (Mo.), 8 R. R. R. 294, 31 Am. & Eng. R. Cas., N.

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fare. Held, that, under the circumstances, his last promise was not a tender.

Same—Ejection of Passengers—Use of Force.†—A railroad company is liable for damages for kicking or throwing a trespasser off a train, or for using more force than is reasonable or apparently necessary to eject him.

Same—Action—Measure of Damages.—The measure of Compensatory damages for using unnecessary force in removing a trespasser from a train, or for kicking or throwing him off, is such sum as will compensate him for his physical and mental suffering, and for any impairment of his earning capacity and loss of time resulting from the injury.

Trial—Instructions—Punitive Damages.—It is error to instruct that the jury ought to award punitive damages in the event that it finds grounds therefor.

Carriers—Ejectment of Trespassers—Action—Instructions—Measure of Damages.—In an action against a railway company by a trespasser for injuries sustained in being ejected, an instruction that if more force than necessary was exercised in putting plaintiff off the train, thereby injuring him, etc., the jury "ought to find for plaintiff a fair compensation according to the evidence for the injuries sustained by him in so doing," does not give the correct measure of damages.

Same—Evidence—Competency—Intent or Motive.—One who is ejected because he refused to tender his fare to the conductor when it was demanded should not be permitted to testify that he was only joking, and that he really intended to pay his fare.

Same—Prior Conduct of Conductor.—In action against a carrier for the malicious act of a conductor in ejecting a trespasser from a train, evidence to show that the conductor had knocked passenger down therefore, and that his company had been sued for it, and as to the frequency of such act, is not admissible in jurisdictions where a common carrier is liable for malicious acts of its servants done in the course of their employment, irrespective of knowledge of the servants' character.

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by H. P. Cottengim against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

S., 294 (tender of fare, burden of proof); note, 5 Am. & Eng. R. Cas., N. S., 308 (legal tender of fare); note, 6 Am. & Eng. R. Cas., N. S., 689 (tender of fare); Missouri, K. & T. Ry. Co. v. Smith (Ind. Terr.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688 (conductor's refusal of fare made by ejected passenger's friend was not justified).

†For the authorities in this series on the subject of the right to use force in ejecting a person wrongfully on a train or car, see foot-notes appended to Clark v. Great Northern Ry Co. (Wash.), 16 R. R. R. 860, 39 Am. & Eng. R. Cas., N. S., 860; foot-notes appended to Toledo, etc., R. Co. v. Gordon (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544.

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Benjamin D. Warfield, J. W. Alcorn, and J. D. Black, for appellant.

James M. Gilbert and B. B. Golden, for appellee.

O'REAR, C. J. Appellee took passage on appellant's passenger train from Corbin to Barbourville. He did not have a ticket, and was drunk. When the conductor asked him for his ticket he responded that he had none, but held out a silver dollar (the fare was 49 cents) and asked the conductor to give him the change. When the conductor offered to take the money, appellee drew it back and demanded his change first. The conductor again offered to accept the money and then give the change, but appellee again drew back his hand and refused to give up the money. The conductor told him he would have to pay the fare or be put off the train. Failing to pay, the train was stopped, and, appellee refusing to get off, the conductor and flagman picked him up and put him off. If this had been all that occurred, we would have no trouble in holding the railroad faultless in the matter; but after the engineer had been signaled to stop, and the train began to slow down, and the conductor and flagman had started to remove appellee, he told them to stop, that he would pay his fare. But they paid no heed to him. He claims, and introduced evidence to show, that the trainmen maltreated him, using more force than was necessary, actually throwing and kicking him from the train while it was in motion. An issue of fact is made in the evidence on this point; but it was submitted to the jury, who found the matter to be as claimed by appellee. We cannot say from the record that their verdict was unauthorized. A passenger should, if he has opportunity, provide himself with a ticket before entering the car. Or, failing that, he should tender the conductor the correct fare to his destination. Or he should tender enough money to pay his fare. If he fails to do so, then he is not a passenger, but a trespasser. Tendering more than the correct fare, without demanding change, is a good tender; but, if coupled with a demand for change as a precedent condition to giving up the money tendered, it is not. *Houston, etc., Ry. Co. v. Campbell* (Tex. Civ. App.) 40 S. W. 431; *Nye v. Marysville Street Ry. Co.*, 97 Cal. 461, 32 Pac. 530; *Thompson on Negligence*, § 3212; 28 A. & E. Encyc. of Law (2d Ed.) 17 & 18; *Flood v. C. & O. Ry. Co.*, 80 S. W. 184, 25 Ky. Law Rep. 2135; *Brown's Adm'r v. L. & N. Ry. Co.*, 103 Ky. 211, 44 S. E. 648. Appellee's conduct in trifling with the train conductor not unreasonably produced the impression that he did not intend to tender the fare. Holding it in his hand and refusing to give it up was no better than if he had kept it in his pocket. After the ejection had begun, a tender might then have been made with the same effect as to restoring appellee's rights as a passenger, according to *L. & N. R. R. Co. v. Breckinridge*, 99 Ky. 1, 34 S. W. 702, a doctrine we are inclined to follow as not unreasonable, although there is considerable respectable authority to the contrary. But there should have been a tender. A mere spoken offer to pay, in the light of what had transpired, need not have

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been noticed. Up to this time the rulings of the trial court were in accord with what has been said.

Although appellee was a trespasser because of his failing to pay or tender fare, and of his conduct, still the trainmen had not the right to throw him from the moving train, or to kick him off, or to use more than was reasonably or apparently necessary to eject him and protect themselves from injury at his hands. For using such excessive force and throwing and kicking appellee off the train, appellant is liable in damages, the measure of which is, in the first place, such sum as will compensate the plaintiff for his physical and mental suffering resulting from any injury so occasioned, and for any impairment of plaintiff's earning capacity and loss of time resulting from the injury. In addition, if the trainmen's conduct was oppressive, malicious, or wanton, the jury were permitted to award punitive damages. The court's instructions covering measure of damages were as follows: "(2) Now, in this case, the court says to the jury that if they shall believe from the evidence that the conductor, or any of the agents and servants of the defendant, in charge of the train on this occasion mentioned in evidence, used more force than was necessary, or appeared to them in the exercise of a reasonable judgment to be necessary, in order to put plaintiff off the train, and thereby injured him in his legs or body, then you ought to find for the plaintiff a fair compensation according to the evidence for the injury sustained by him in so doing; and if you shall further believe from the evidence that the agents and servants of the defendant in charge of that train maliciously assaulted, beat, and bruised plaintiff, or maliciously carried plaintiff to the steps of the train and threw him therefrom, or maliciously kicked him so as to injure him in the body or legs, or if they maliciously cursed plaintiff, so as to intimidate him in the presence and hearing of so many people, then you ought to find for plaintiff such punitive damages, in the way of smart money, as will in your judgment from the evidence be proper and adequate punishment of the defendant for such malicious conduct, if any, not exceeding in all the sum of \$5,000, the amount claimed in the petition." The correct measure of compensatory damages was not given; nor should the court have told the jury that they "ought" to award punitive damages in the event the grounds therefor existed. The infliction of such damages is a matter within the discretion of the jury solely. It is error for the court to indicate that the jury ought to award such damages. *Ky. C. Ry. Co. v. Gastineau's Adm'r*, 83 Ky. 119; 1 Sedgwick on Damages, 387.

Appellee argues that, though this instruction were incorrect, still the verdict (\$400) did not include exemplary damages, and therefore the error was harmless. If appellee sustained the physical injuries to the extent claimed by him, it would seem that the jury gave him compensation only. But there is a dispute as to the extent of his injuries; the railroad company even contending that he was not injured at all by the trainmen, but

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that his injuries, if he had any, resulted from other causes, and probably after he had left the train. Be that as it may, it was for the jury to say whether he was injured by the railroad company and to apply the correct standard of compensation to such. It was said by this court that a verdict for \$500 for the ejection of a passenger who was not injured, and where there was no oppressive conduct toward him by the trainmen, was excessive. *L. & N. R. Co. v. Breckinridge*, 99 Ky. 1, 34 S. W. 702. Inasmuch as neither of the instructions on the measure of damages was correct, the award by the jury, whether for compensation only, or for punishment only, or for both, has nothing to support it.

There are two matters of evidence also calling for notice. Appellee was permitted to testify that he was joking, and had really intended to pay his fare, and would have done so. Unless he had stated to the conductor that he was joking, or the fact was known to that official, the evidence seems to us to be immaterial. The secret purposes of one, in contravention of his express words or acts, are not receivable to relieve him from the effect of the latter, when another has been induced to act upon them as sincerely spoken or intentionally done.

Appellee was allowed to ask the conductor, when the latter was testifying as a witness, whether he had not heretofore knocked passengers down, and his company had been sued for the act, and if it had not occurred frequently. As evidence to show that the conductor in the instant case has assaulted appellee, it was not relevant. We have the rule in this state that a common carrier corporation is liable for the wanton and malicious act of its servants done in the course of their employment, whether or not the master knew of the character of the servant. Other jurisdictions have sometimes held that the master is not liable unless it knew of the servant's character or reputation and continued him in its service notwithstanding such knowledge. In such jurisdictions the evidence under discussion would have been relevant as tending to show the master's knowledge of the servant's character. But with us the knowledge of the master is not necessary to make it answer for the servant's conduct, when acting as such servant. Therefore the evidence was not receivable for that purpose. In no event was it material or pertinent to the case in hand.

For the reasons given the judgment must be reversed, and the cause remanded for a new trial under proceedings not inconsistent herewith.

NORFOLK & W. RY. CO. v. STEGALL'S ADM'X.

(Supreme Court of Appeals of Virginia, June 21, 1906.)

[54 S. E. Rep. 19.]

Death—Action—Pleading.—Where, in an action for death, the first count of the declaration failed to set forth the circumstances attending the death of plaintiff's intestate in such manner as to show that the relations existing between the parties imposed a duty on defendant, the negligent breach of which was the proximate cause of intestate's death, it was fatally defective.

Pleadings—Demurrer to Declaration—Several Counts.—Where a declaration containing more than one count is demurred to as a whole, the demurrer should be overruled if any of the counts are good.

Same.—Where there are two or more counts in a declaration or a single count containing several breaches, some well and others ill assigned or containing a demand of several matters, divisible in their nature, some of which are well and other ill claimed, and a demurrer is filed to the whole declaration and to each count thereof or to the several breaches assigned, the demurrer must be sustained to the invalid counts or breaches and overruled as to the others.

Railroads—Persons on Track—Duty to Licensee.*—A railroad company does not owe the duty of prevision to a bare licensee on its tracks, nor does it owe him the duty of employing competent servants to manage its trains, or to run them in any particular manner, or a particular rate of speed.

Same—Declaration.—Where, in an action against a railroad company for death of a bare licensee on the track, the declaration merely alleged that defendant was negligent in pushing its train of cars in front of the engine across the trestle without any lookout on the end of the cars and at a rate of speed forbidden by the city ordinances, the proximate cause of deceased's death was thereby attributed to the combined effect of such breaches, and defendant being under no obligation to deceased, except not to operate its cars in violation of the ordinance, the declaration was insufficient.

Negligence—Pleading—Duty.—In an action founded on defendant's

*For the authorities in this series on the subject of the care due licensees and trespassers on railroad tracks, see foot-notes appended to *Hall v. Western & A. R. Co.* (Ga.), 19 R. R. R. 567, 42 Am. & Eng. R. Cas., N. S., 567; *Hulsey's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 19 R. R. R. 557, 42 Am. & Eng. R. Cas., N. S., 577; *Copp v. Maine Cent. R. Co.* (Me.), 19 R. R. R. 199, 42 Am. & Eng. R. Cas., N. S., 199; *Louisville, etc., Ry. Co. v. Jolly* (Ky.), 18 R. R. R. 154, 42 Am. & Eng. R. Cas., N. S., 154; *Glenn's Adm'r v. Louisville & N. R. Co.* (Ky.), 19 R. R. R. 143, 42 Am. & Eng. R. Cas., N. S., 143; *Texas & N. O. Ry. Co. v. McDonald* (Tex.), 19 R. R. R. 503, 42 Am. & Eng. R. Cas., N. S., 503; foot-notes appended to *Alabama Great S. R. Co. v. Guest* (Ala.), 18 R. R. R. 759, 41 Am. & Eng. R. Cas., N. S., 759; *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737; *Williamson v. Southern Ry. Co.* (Va.), 18 R. R. R. 492, 41 Am. & Eng. R. Cas., N. S., 492.

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negligence, the declaration must directly and positively allege, otherwise than by mere recital, what duty was owing by defendant to plaintiff, the failure to discharge which caused the injury complained of and its breach, or aver such facts as will show the existence of the duty and its breach.

Error to Corporation Court of Bristol.

Action by Stegall's administratrix against the Norfolk & Western Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed and remanded.

Fulkerson, Page & Hurt, for plaintiff in error.

J. S. Ashworth and W. F. Rhea, for defendant in error.

WHITTLE, J. This action of trespass on the case was brought by the defendant in error to recover damages for the death of her intestate, which is attributed to the negligence of the plaintiff in error.

There was a verdict and judgment for the plaintiff in the trial court, and the defendant brings error.

The first assignment of error questions the action of the court in overruling the demurrer to the declaration. The declaration contains two counts, and the demurrer is to the entire declaration and to each count thereof, and is accompanied by a statement in writing of the grounds of demurrer relied on. Va. Code, 1904, § 3271.

The first count wholly fails to set forth the circumstances attending the death of plaintiff's intestate in such manner as to show that the relations existing between the parties were of a character to impose a duty upon the defendant, the negligent breach of which was the proximate cause of his death, and is plainly insufficient. *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Hortenstein v. Va. Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996.

The recent case of *Virginia & North Carolina Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991,—citing a number of Virginia decisions in point—illustrates the rule that “a demurrer to a declaration as a whole raises the question whether the declaration sets out sufficient matter to sustain the action; and if there are several counts in the declaration and any of them is good, the demurrer should be overruled.”

But it is also a well-settled rule of pleading and practice that where there are two or more counts in a declaration, or a single count containing several breaches, some well and others ill assigned; or containing a demand of several matters, divisible in their nature, some of which are well and others ill claimed, and there is a demurrer to the whole declaration and to each count thereof, or to the several breaches assigned, the demurrer must be sustained to the faulty counts or breaches, and overruled as to such counts or parts of the declaration as are not amenable to objection. 1 Rob. Pr. (old) pp. 281, 282; 1 Chit. Pl. (14

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Am. Ed.) 664; 2 Tuck. Com. (3d Ed.) p. 261; 4 Min. Inst. pt. 2 (3d Ed.) p. 1107; 1 Bar. L. Pr. (2d Ed.) pp. 456, 457.

In accordance with these authorities, the order of the court overruling the demurrer to the first count of the declaration constitutes error for which the judgment would have to be reversed, even though the second count set out a good cause of action.

We are of opinion, however, that the second count is likewise bad. It alleges that the defendant's side track extends over a trestle or bridge spanning a creek in the city of Bristol, which affords the only available means to pedestrians of crossing the stream at that point, and which, with the knowledge and consent of the defendant, was constantly used by the public for that purpose; that at the time of the accident, plaintiff's intestate was upon the track of the defendant, crossing the trestle, as a licensee, and it became the duty of the defendant to exercise ordinary care in propelling its engine and cars over the trestle with knowledge of its constant use by the people of the community as a passway; yet, on the occasion of the accident, without regard to the rights of the public and plaintiff's intestate, the defendant with gross carelessness and reckless negligence pushed a train of cars in front of an engine, with no lookout upon the end of the cars, at a dangerous and rapid rate of speed, against and over the decedent, who was at the time lawfully crossing the trestle as a licensee; that the trestle was so situated that cars approaching from the west could only be seen for a short distance. The count then proceeds to aver, that, by the exercise of ordinary care in the management of its engine and cars, and by its employees so looking out ahead of the train, the peril of plaintiff's intestate could and ought to have been discovered and the accident averted, nevertheless, it is said, the defendant recklessly and carelessly, and without ordinary care, propelled its cars at a rate of speed which was not only dangerous but contrary to the ordinance of the city of Bristol, and thereby struck plaintiff's intestate and killed him.

This count, it will be observed, does not allege that the decedent was seen on the trestle by the defendant's employees in charge of the train, nor is it distinctly averred that by the exercise of ordinary care on their part alone he might have been seen and his peril discovered in time to have avoided the injury; for the allegation is predicated upon the presence of a lookout on the end of the cars in addition to the regular crew. In other words, the gravamen of the second count is that the defendant was negligently pushing its train of cars in front of the engine across the trestle, with no lookout upon the end of the cars, and at a rate of speed forbidden by the city ordinance.

The doctrine is settled by repeated decisions of this court, that a railroad company does not owe the duty of provision to a bare licensee upon its track; nor does it owe him the duty of employing competent servants to manage its trains, or to run them in a particular manner or at a particular rate of speed—"The gen-

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eral rule being that a bare licensee * * * is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there." 2 Shear. & Red. on Neg. § 705; Nichols Adm'r v. R. Co., 83 Va. 102, 5 S. E. 171, 5 Am. St. Rep. 257, and cases cited; Gillis v. Penn. R. Co., 59 Pa. 129, 98 Am. Dec. 317; Holland, etc., v. Sparks, 92 Ga. 753, 18 S. E. 990. This being so, it would seem that the declaration does not state a good cause of action against the defendant company (Hounsell v. Smyth, 7 C. B. [N. S.] 729; Mathews v. Bensel, 51 N. J. Law, 30, 16 Atl. 195), since it does not aver that it intentionally or willfully injured him, or that after it saw or knew of his danger, or by the exercise of ordinary care could have avoided injuring him but failed to do so." Norfolk & Western Ry. Co. v. Wood, *supra*.

In yet more recent cases it has been held that a railway company does not owe a licensee the duty of blowing its whistle, ringing its bell, running its engine at any particular rate of speed, or having a light on its engine. C. & O. Ry. Co. v. Rodgers' Adm'r, 100 Va. 324, 41 S. E. 732; Williamson v. Southern Ry. Co. (Va.) 51 S. E. 195, 70 L. R. A. 1007.

It is clear, therefore, from the authorities, that the defendant was not guilty of actionable negligence in pushing the train in question over its trestle, and was under no obligation to keep a lookout on the end of its cars, or, in anticipation of decedent's presence on the trestle, to provide for his safety. It was the duty of the defendant, it is true, to observe the speed ordinance of the city of Bristol; but the alleged violation of that ordinance is commingled with the averments that the defendant was derelict in its duty to the decedent in pushing instead of pulling its train across the trestle, and in not stationing a lookout on the end of the cars, to the combined effect of all of which the injury complained of is ascribed as the proximate cause.

We are of opinion that a count in a declaration thus blending allegations of duty, only one of which imposes any obligation upon the defendant, and attributes the accident to the cumulative effect of all as the proximate cause, does not conform to the reasonable rule of pleading applicable to this class of cases, which requires that the duty alleged to be owing from the defendant and the acts of negligence relied on shall be stated with sufficient particularity and clearness to enable the defendant to understand the nature of the charge that he is called upon to answer.

"In an action of tort, founded on the negligence of the defendant, the declaration must allege what duty was owing by the defendant to the plaintiff, the failure to discharge which caused the injury complained of, and its breach, or make such averments of facts as will show the existence of the duty and its breach. These averments must be made directly and positively and not merely by way of recital." Hortenstein v. Va.-Car. Ry. Co., *supra*; Southern Ry. Co. v. Hansbrough's Adm'r (decided at the present term.) 54 S. E. 17.

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For these reasons the trial court ought to have sustained the demurrer to the declaration and to each count thereof.

There are several other assignments of error, but, as the questions involved are not likely to arise at the next trial of the case, it is unnecessary to discuss them.

The judgment must be reversed, the verdict of the jury set aside, and the case remanded to the corporation court, with leave to the plaintiff, if so advised, to amend her declaration, and for further proceedings to be had therein.

KEITH, P., absent.

HARPER v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, Oct. 19, 1906.)

[109 N. W. Rep. 227.]

Street Railroads—Injuries to Animals—Care Required.*—When dogs are engaged in fighting upon street railway tracks, and are apparently oblivious to an approaching car, the motoneer, upon discovering them in a position of peril, is required to exercise reasonable care by using proper signals or checking the speed of his car, to avoid their injury. Evidence sufficient to sustain the verdict.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Oscar Hallam, Judge.

Action by Edward Harper against the St. Paul City Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Munn & Thygeson, for appellant.

J. W. Pinch and *J. R. Blackwell*, for respondent.

LEWIS, J. Verdict in favor of respondent for \$50 damages for the killing of an English setter by appellant company. Two witnesses on behalf of respondent testified that they were driving in a southerly direction on the west side of the street car tracks on Snelling avenue, in the city of St. Paul, and noticed the two dogs fighting between the rails of the east track, and that they remained there for several minutes in fierce combat and until the north-bound car struck them; that the car was running about 12 or 15 miles an hour, and that the motoneer made no attempt to check the speed of the car and did not blow any whistle or ring any bell. The country was level for a distance of nearly 300 feet, and, if the testimony of these witnesses be accepted as

*For the authorities in this series on the subject of the liability of railroads for running over dogs on their tracks, see foot-note appended to *Moore v. Charlotte, etc., Co.* (N. Car.), 14 R. R. R. 135, 37 Am. & Eng. R. Cas., N. S., 135.

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true, then, if in the exercise of his usual duties, the motorman must have seen the dogs on the track. This evidence was strongly denied by the motorman and other witnesses of appellant, but was credited as true by the trial court and jury, and we are bound by their decision.

The case was submitted to the jury upon the proposition of law that, if the motoneer saw the dogs on the track, he was required to use such care as a reasonably prudent person would exercise under like circumstances to avoid collision with them, and if it appeared that the car was equipped with the usual signals, and the dog was on the track, and the motoneer saw him, then the jury should determine whether the motorman did in fact give such signals as reasonable prudence would dictate under the circumstances. As to the instruction, it is very clear that the trial court had no intention of limiting the exercise of reasonable care to the usual signals, but also had in mind the control of the speed of the car by the motoneer, and it was quite proper to mention the use of signals as bearing upon the degree of care required. It might be that the ringing of the bell alone, under such circumstances, would not have attracted the attention of the animals; but it was not error to refer to the usual manner of giving warning of the approach of the car, to be considered upon the general question submitted. In *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577, it was stated that a street car company was not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collisions with dogs; that ordinarily dogs may be presumed to take care of themselves, and the motorman may act on such presumption. This was a correct statement of law with reference to the facts of that case, and we adhere to that opinion, believing it to be the true doctrine that railways should not be held to the same degree of care with respect to dogs as to other animals running at large, such as cattle and horses.

As to such animals the rule is stated in *Mooers v. N. P. Ry. Co.*, 69 Minn. 90, 71 N. W. 905, where it was held that locomotive engineers are not bound to keep a lookout for animals trespassing on the track, nor to presume they will be there, but, having notice of their presence and that they are liable to injury, are bound to use reasonable care, at least, to avoid injury. In that case some horses escaped from a pasture and were running on the railroad track ahead of an approaching train, and the engineer ran them down without making any effort to avoid the collision. We apprehend that the same rule should not be applied in the case of dogs, owing to their superior intelligence, agility, and instinctive ability to get out of danger. Consequently persons in charge of street cars should not be required to slow down merely because dogs may be running in the vicinity of, along, or across the tracks. Under such circumstances, motoneers may well assume that dogs will get out of the way. However, under the laws of this state dogs are property, and, whether rightfully or wrongfully upon the tracks, cannot be

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ignored when discovered in a position of danger. In this instance the dogs were engaged in a fierce fight, and their attention was not likely to be attracted by the noise alone of the approaching car. If the motorman was aware of their situation, then he should have taken reasonable precaution to avoid injury to them. There is no hardship in such a rule, and it has been generally applied, or recognized, in this class of cases. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518, 66 Am. St. Rep. 754; *Meisch v. Rochester Electric Co.*, 72 Hun, 604, 25 N. Y. Supp. 244; *Marshall v. Dallas Consolidated Electric St. Ry. Co.* (Tex. Civ. App.) 73 S. W. 63; *Moore v. Electric Co.*, 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470; *Jones v. Bond* (C. C.) 40 Fed. 281; *St. Louis, A. & T. Ry. Co. v. Hauks*, 78 Tex. 300, 14 S. W. 691, 11 L. R. A. 383; *Hamby v. Samson*, 105 Iowa, 112, 74 N. W. 918, 40 L. R. A. 508, 67 Am. St. Rep. 285.

Order affirmed.

BAICKER v. PEOPLE'S ST. RY. CO. OF NANTICOKE & NEWPORT.

(Supreme Court of Pennsylvania, May 24, 1906.)

[64 Atl. Rep. 675.]

Street Railroads—Collision with Team—Evidence.—In an action to recover for a collision between a street car and plaintiff's wagon, where the evidence shows that if plaintiff had continued in his course, he could have cleared the track before the car reached the point of crossing, and no collision would have occurred, but having changed his mind, he attempted to back off, and that the motorman acted on the belief that he would succeed, and plaintiff acted on the same belief, he could not recover for the injuries received.

Mestrezat, J., Dissenting.

Appeal from Court of Common Pleas, Luzerne County.

Action by Abe Baicker against the People's Street Railway Company of Nanticoke & Newport. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John M. Garman, for appellant.

Q. A. Gates, for appellee.

ELKIN, J. Green street is one of the principal avenues in the borough of Nanticoke. The accident in this case occurred at a right-angled crossing of intersecting streets in said borough. The appellant had passed from a narrow street called Maple out upon Green street with the intention of crossing it. He stopped, looked and listened for an approaching car at the side line of

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Green street, and seeing none, he started to cross the defendant's track, proceeding with caution on account of two stoves which constituted his load. When upon the track he saw for the first time the advancing car as it was turning into Green from Hanover street, something over 100 feet distant. Instead of proceeding forward and clearing the track, he stopped his horse and attempted to back off. He did not succeed in so doing. The approaching car, before it was brought to a full stop, struck the front wheel of his wagon, from which he was thrown out and received the injuries for which damages are claimed in this action. The horse was thrown down and the wagon somewhat damaged. The car was stopped within about a foot of the point of its contact with the wagon. There is no evidence indicating that the motorman did not have complete control of the car, or that it was running at an excessive rate of speed. The learned court below in overruling the motion to take off the nonsuit, among other things said: "It may be presumed that when he turned in from Hanover on Green street he saw the plaintiff driving across the track 100 feet away. He had no reason to think, and was not bound to anticipate, that Baicker, instead of proceeding, would stop and attempt to reverse his motion and back off, or that the attempt would not be successful. The plaintiff evidently thought it could be done. It would be a strange rule that would relieve the plaintiff from negligence in acting upon that belief, and convict the motorman of negligence in entertaining and acting on the same belief. Each had a right to presume that the other would exercise the precaution which the situation demanded."

This court has frequently said that it is as much the duty of the driver of a team to avoid a collision in these cases as it is the motorman of a car. If the appellant had continued in his course, he no doubt would have cleared the track before the car reached that point, and no collision would have occurred, but having changed his mind, he attempted to back off, thus confusing the situation, the motorman acting on the belief that he would succeed, and the driver acting on the same belief.

Under these circumstances, we are of opinion that the testimony is not sufficient to justify a recovery of damages for the injuries resulting from the accident.

Judgment affirmed.

MESTREZAT, J., dissents.

CUMMING *v.* GREAT NORTHERN RY. CO.

(Supreme Court of North Dakota, July 9, 1906.)

[108 N. W. Rep. 798.]

Railroads—Injury to Cattle.*—Where the owner of cattle negligently permits them to stray upon a railroad track, the railroad company is not liable for injury to the cattle by trains, unless it failed to use ordinary care to avoid the accident after discovering the animals on the track.

Same.—Evidence examined, and held, that it conclusively disproves any negligence on the part of the defendant.

Syllabus by the Court.

Appeal from District Court, Ramsey County; J. F. Cowan, Judge.

Action by John Cumming against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Murphy & Duggan, for appellant.

Fred J. Traynor and *W. M. Anderson*, for respondent.

ENGERUD, J. This is an appeal from a judgment awarding plaintiff damages for the alleged negligent killing of a cow by defendant. It is admitted that the animal was injured by being struck by a passenger train. The cow was trespassing on the defendant's right of way on the 18th of May, and had been permitted by plaintiff to run at large, contrary to law, and graze along the railroad track, which was unfenced; the company being under no obligation to fence. Under such circumstances, the company is not liable, unless its servants failed to use ordinary care to avoid the accident after discovering the animal on the track. *Wright v. Railway Co.*, 12 N. D. 159, 96 N. W. 324. The only person who saw the accident was the engineer in charge of the train. His testimony as to the circumstances of the accident is wholly undisputed. He saw several cattle grazing along the track a considerable distance ahead. The train was a regular passenger train, consisting of an engine and six coaches, and was running about 35 miles an hour. As the train approached the cattle, one cow started to go upon the track. She was about 300 feet ahead. The engineer immediately shut off the steam and applied the air brakes, but could not stop the train before he

*For the authorities in this series on the subject of the duties and liabilities of railroads with respect to stock on their tracks as affected by the fact that the animals were unlawfully at large, see foot-notes appended to *Southern Ry. Co. v. Hoge* (Ala.), 17 R. R. R. 792, 40 Am. & Eng. R. Cas., N. S., 792; foot-notes appended to *Laronde v. Boston & M. R. R.* (N. H.), 16 R. R. R. 223, 39 Am. & Eng. R. Cas., N. S., 223.

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struck the cow. The brakes were in perfect condition and worked properly. It was doubtful if the train could have been stopped in that distance, even by application of the emergency brake; but the use of that appliance is attended with great danger to the train and passengers. It cannot be pretended that ordinary care required, or even justified, resort to that appliance to avoid injury to an animal at the peril of injury to the train and passengers. The engineer admitted on cross-examination that the engine might have got past the point of collision before the cow reached it, if he had not reduced the speed. If the engineer had had time to make this calculation when the cow started towards the track, there is no doubt that a man of his experience would have put on more steam instead of applying the brakes. He was an engineer with more than 20 years' experience, and he did what in his judgment ought to have been done to avoid the collision. He had no time to calculate the speed of the cow or the distance she would traverse to reach the track. He would reasonably expect that even a cow would be frightened and turned from her fatal course by the sound of the whistle and the sight of the approaching train.

Considerable stress is laid on the testimony of witness McVey, and it is claimed that it discredits the engineer's testimony. This witness' testimony is so confused, and in some respects inconsistent, that it is of little or no value; but, giving it full credit and the most favorable construction, there is nothing in it which throws any discredit on the engineer's statement of how the accident occurred. As we view the evidence, it shows conclusively that there was no negligence on plaintiff's part. Defendant's motion for a directed verdict ought to have been granted, and that having been erroneously denied, the error should have been corrected by granting the motion for judgment notwithstanding the verdict.

The judgment is reversed, with directions to enter judgment dismissing the action on the merits notwithstanding the verdict. All concur.

WOODWARD *et al.* v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, April 25, 1906.)

[145 Fed. Rep. 577.]

Trial—Verdict Should Be Directed When Only One Sustainable.— It is the duty of the trial court to direct a verdict at the close of a trial before a jury in two classes of cases: (1) That class in which there is no conflict in the evidence; and (2) that class in which the evidence is conflicting, but is of so conclusive a character that the court in the exercise of a sound judicial discretion would set aside a verdict in opposition to it.

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Railroads—Fires—Statutory Presumption from Setting by Railroads in Minnesota Rebuttable.*—The presumption of negligence or of defects in machinery from scattering fire, raised by section 2700, Gen. St. Minn. 1894, was created to change the burden of proof. When this has been done, and the evidence has been adduced, it is *functus officio*, and it cannot be used to raise an issue which the evidence does not present.

Same—Court Should Direct Verdict as in Other Cases.†—If the proper employees of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the locomotive was operated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption of negligence is overcome as a matter of law, and

*For the authorities in this series on the subject of the presumption of negligence from the fact that a fire was started by sparks from a railroad locomotive, see foot-notes appended to *Norfolk & W. Ry. Co. v. Fritts* (Va.), 18 R. R. R. 246, 41 Am. & Eng. R. Cas., N. S., 246; foot-note appended to *Southern Ry. Co. v. Johnson* (Ala.), 18 R. R. R. 162, 42 Am. & Eng. R. Cas., N. S., 162; *Fireman's Ins. Co. v. Seaboard Air Line Ry. (N. Car.)*, 16 R. R. R. 808, 39 Am. & Eng. R. Cas., N. S., 808; *St. Louis, etc., Ry. Co. v. Coombs* (Ark.), 16 R. R. R. 480, 39 Am. & Eng. R. Cas., N. S., 480.

†For the authorities in this series on the subject of the rebuttal of the presumption of negligence arising from the fact that a fire started by sparks from a locomotive, see *St. Louis, I. M. & S. Ry. Co. v. Coombs* (Ark.), 16 R. R. R. 480, 39 Am. & Eng. R. Cas., N. S., 480 (sufficiency of negative testimony to warrant finding either that the engine was not properly equipped or operated; and that defendant had not rebutted the presumption of negligence raised against it); *Olmstead v. Oregon Short Line R. Co.* (Utah), 12 R. R. R. 261, 35 Am. & Eng. R. Cas., N. S., 261 (presumption was rebutted by proof that the engine was properly equipped with spark arresters, and was properly operated); *Atchison, etc., Ry. Co. v. Geiser* (Kan), 10 R. R. R. 92, 33 Am. & Eng. R. Cas., N. S., 92 (question for the jury, not for the court, whether *prima facie* case was overcome by evidence that engine was properly equipped and managed); *Great Northern Ry. Co. v. Coats* (C. C. A.), 5 R. R. R. 50, 28 Am. & Eng. R. Cas., N. S., 50 (question for jury whether presumption was rebutted by evidence, which was not directly contradicted, tending to show that locomotive was properly equipped and operated); *Gulf, etc., Ry. Co. v. Johnson* (Tex.), 1 R. R. R. 831, 24 Am. & Eng. R. Cas., N. S., 831 (defendant need not show by the preponderance of evidence that it was not negligent); *San Antonio & A. P. Ry. Co. v. Adams* (Tex. Civ. App.), 1 R. R. R. 878, 24 Am. & Eng. R. Cas., N. S., 878 (proof that the railroad used the best spark arresters, and that the fire did not originate on the right of way, is sufficient to overcome a *prima facie* case by plaintiff); *St. Louis, etc., Ry. Co. v. Miller* (Tex. Civ. App.), 1 R. R. R. 874, 24 Am. & Eng. R. Cas., N. S., 874 (where the railroad showed the use of proper spark arresters, but did not show their condition, or that the engine was properly managed, it had not rebutted the presumption of negligence); *McTavish v. Great Northern Ry. Co.* (N. Dak.), 14 Am. & Eng. R. Cas., N. S., 59 (defect in the engine and negligence in its operation are questions for jury where there is evidence of other fires on same day by same engine, although statutory presumption of negligence has been overcome); *Alabama G. S. R. Co. v. Johnston* (Ala.), 29 Am. & Eng.

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it is the duty of the trial court to instruct the jury in a fire case from Minnesota, as in other cases, to return a verdict for the defendant.

Same—Negligence—Customary Speed of Passenger Train on Dry and Windy Days Is Not.†—A railway company owes to the owners of isolated buildings near its track no duty to stop or to diminish the customary speed of its regular passenger trains as they pass them on dry and windy days, in the absence of fires previously set or other evidence of the danger of setting a fire.

Evidence—Testimony That Act Was Not Done Based on Absence of Record and the Record Itself Admissible.—In the absence of memory, one who knows that, if an act had been done by him or by his department, it would have been recorded upon a book or paper which he had at the time and which he identifies, may testify that he knows it was not done, from the absence from the record of any note of it, although this fact does not refresh his memory, and the record and this testimony are competent evidence of the fact the act was not performed.

Railroads—Fires—Condition of Locomotive During Preceding Month Not Too Remote.§—Testimony of the condition of the devices upon a locomotive for arresting sparks and preventing the escape

R. Cas., N. S., 909 (presumption of negligence places upon defendant the burden of showing that its locomotives were properly equipped, and in good repair, and properly managed); Alabama, etc., R. Co. v. Taylor (Ala.), 21 Am. & Eng. R. Cas., N. S., 135 (presumption overcome by proof that engine was properly equipped and operated, and in good repair); Drake v. Yazoo & M. V. R. Co. (Miss.), 21 Am. & Eng. R. Cas., N. S., 141 (where there is no testimony as to how an engine was handled at the time its sparks set fire to a meadow, or as to the kind of spark arresters used, or its condition, or that the engineer and fireman were competent and skillful, and used due care, the presumption of negligence arising from the fact of the fire is not overcome); Central of Ga. Ry. Co. v. Trammel (Ga.), 23 Am. & Eng. R. Cas., N. S., 856 (when, independently of the legal presumption arising against a railroad company, there is evidence which would warrant a finding against it, it is proper to refuse to give in charge a request that this presumption is rebuttable, and that testimony of the employees of the railroad having this effect, "in the absence of anything to discredit and contradict it, cannot be arbitrarily disregarded"); Louisville & N. R. Co. v. Marbury Lumber Co. (Ala.), 18 Am. & Eng. Cas., N. S., 508 (where defendant's evidence shows that its appliances for the prevention of fires were of proper pattern and construction, and in good repair, and that there was no negligence in the operation of the engine, it is the duty of the court to hold as a matter of law, that the presumption is overcome).

†For the authorities in this series on the subject of the duties and liabilities of railroad companies relating to fires set by locomotives (questions of statutory law, damages, and evidence, excluded); see foot-notes appended to Norfolk & W. Ry. Co. v. Fritts (Va.), 18 R. R. 246, 41 Am. & Eng. R. Cas., N. S., 246; Cincinnati, etc., Ry. Co. v. South Fork Coal Co. (C. C. A.), 17 R. R. 280, 40 Am. & Eng. R. Cas., N. S., 280; Birmingham Ry., etc., Co. v. Hinton (Ala.), 17 R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173.

§See extensive note, 18 R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

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of fire at various times within a month preceding the setting of the fire in controversy is not too remote.

Same—Evidence of Requirement and Custom of Inspection Competent.—Testimony that for a number of years the railway company required the fireman of its passenger trains, and that it had been their custom, to inspect the dampers, ashpans and dump grates of their locomotives before they started on their trips to see that they were clean and in good order, and that the company had required both firemen and engineers to report what, if anything, was needed, is competent upon the issue of the negligence of the company.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

See 122 Fed. 66.

P. J. McLaughlin (*F. W. Gail* and *William D. Mitchell*, on the brief), for plaintiffs in error.

F. W. Root, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an action against the railway company for damages for alleged negligence in the operation of one of its locomotives whereby the farm buildings of the plaintiff Woodward were burned. The main line of the defendant's railroad between Minneapolis and Chicago ran within 150 feet of Woodward's buildings. Between the railroad and the buildings there was a traveled highway. On the afternoon of May 1, 1900, after an engine of the defendant drawing a regular passenger train of eight cars had passed southeasterly along the railroad, a fire, which subsequently consumed the buildings, was discovered in some combustible material 106 feet northeasterly from the railroad. It was a dry time, and a strong wind was blowing across the track from the southwest. As the engine passed at the usual speed of about 35 miles an hour, sparks and cinders flew from its smokestack, and some of them were blown into an open window of one of the cars and were probably of the size of a navy bean. When the plaintiffs had established these facts they rested their case, and the defendant introduced evidence to the effect that there were no defects in its locomotive, and that there was no negligence in its operation which could have caused the fire. The court then charged the jury to return a verdict for the defendant, and this instruction is the first alleged error, which is specified.

It is the duty of the trial court to direct a verdict at the close of the evidence in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting but is of so conclusive a character that the court in the exercise of a sound judicial discretion would set aside a verdict in opposition to it. And, where the trial court has directed a verdict upon the latter ground, the appellate court may not lawfully reverse the judgment founded upon it, unless upon

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a consideration of the evidence it is convinced that it was not of such a conclusive character that the court below in the exercise of a sound judicial discretion should not have sustained a verdict in the opposite direction. *Patton v. Tex. & Pac. Ry. Co.*, 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361; *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478, 481, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003; *Marshall v. Hubbard*, 117 U. S. 415, 417, 419, 6 Sup. Ct. 806, 29 L. Ed. 919; *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 674, 15 Sup. Ct. 718, 39 L. Ed. 853; *Riley v. Louisville & N. R. Co.*, 66 C. C. A. 598, 133 Fed. 904; *Haggerty v. Chicago, Milwaukee & St. Paul Ry. Co.* (C. C. A.; decided at the September, 1905, term), 141 Fed. 966; *Waters-Pierce Oil Company v. Van Elderen* (C. C. A.) 137 Fed. 557, 569, 571; *Chapman v. Yellow Poplar Lumber Co.*, 32 C. C. A. 402, 404, 89 Fed. 903, 905; *New York Central, etc., R. Co. v. Difendaffer*, 62 C. C. A. 1, 3, 125 Fed. 893, 895; *Shoup v. Marks*, 62 C. C. A. 540, 545, 128 Fed. 32, 37.

The court below directed the verdict on this ground, and the question is: Should that court in the exercise of a sound judicial discretion have sustained a verdict upon the evidence in this case to the effect that the defendant failed to exercise ordinary care to avoid setting a fire to Woodward's property by the operation of its railroad? For the gravamen of this action is not the setting of the fire, but the negligence of the defendant whereby the fire was kindled. The railroad company had the same right to operate its railroad by the use of engines, cars, fire, and steam near the premises of Woodward that the latter had to carry on his farm by the use of horses, men, machinery, steam, and electric power in proximity to the railroad. The limit of the duty of each was to exercise ordinary care to prevent injury to the property of the other by the use of his own. Neither was liable to the other for injuries which resulted from the use of his own property, notwithstanding his exercise of reasonable care to prevent them.

There was undisputed evidence that the use of the most approved devices and machinery and the reasonably careful operation of locomotives will retain only about 75 per cent. of the sparks necessarily manufactured in their operation, while 25 per cent. thereof will be unavoidably thrown forth from the smoke-stack upon the air. If the property of Woodward was injured by one of these sparks whose escape ordinary care could not have prevented, the company was not liable for the damage caused thereby, because that damage was not the result of any negligence on its part, and it owed him no duty to avoid damages which reasonable care could not prevent.

There was evidence in this case from which a jury might have inferred that the fire was set by a spark thrown from the smoke-stack of the defendant's locomotive. The specific question, therefore, which the court was called upon to determine, was whether or not the evidence was so conclusive that this spark was not one of the 75 per cent. whose escape might have been prevented

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by ordinary care that a verdict to the contrary could not have been lawfully sustained. The statute of Minnesota did not relieve the court from the determination of this question. It provides that:

"All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damage caused by fire being scattered or thrown from said cars or engines, without the owner or owners of the property so damaged being required to show defect in their engines or negligence on the part of their employees; but the fact of such fire being so scattered or thrown shall be construed by all courts having jurisdiction as prima facie evidence of such negligence or defect." Gen. St. Minn. 1894, § 2700.

Statutes of the same nature have been adopted in the adjoining states of North Dakota and South Dakota. These statutes were passed because it was so difficult for claimants of damages caused by fires set by railroad companies to establish in the first instance the facts that their locomotives were defective, or that they were negligent in their operation. The purpose of the legislators in enacting these laws was simply to change the burden of proof so that the defendants might be required to produce the witnesses at their command who were familiar with the facts on which the evidence of negligence depends. The practical and legal effect of these statutes corresponds with the reason for their existence. It is to raise a presumption from the scattering of coals or sparks of fire or the setting of a fire by a locomotive that there was either a defect therein, which might have been avoided by the exercise of reasonable care, or negligence in its operation. The presumption, however, is not a conclusion of law. It is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof. When that result has been attained, the presumption becomes *functus officio*. It may not be used after the evidence of the facts has been adduced to raise an issue for the jury which the evidence itself does not present. Hence, in the first instance, it is always a question of fact for the court at the close of the evidence whether or not the presumption of negligence arising from these statutes has been overcome by the evidence of the care exercised by the defendant. If the proper employees of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the engine was operated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption has been overcome as a matter of law, and it is the duty of the court to instruct the jury in a fire case from these states, as in other cases, to return a verdict for the railway company. *Rosen v. Chicago G. W. Ry. Co.*, 27 C. C. A. 534, 536, 83 Fed. 300, 302; *Karsen v. Railroad Co.*, 29 Minn. 12, 14, 15, 11 N. W. 122; *Daly v. Railway Co.*, 43 Minn. 319, 45 N. W. 611; *Smith v. Railroad Co.*, 3 N. D. 17, 23, 53 N. W. 173; *McTavish v. Great Northern Ry. Co.* (N.

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D.) 79 N. W. 443, 446; *Spaulding v. Railroad Co.*, 30 Wis. 110, 123, 11 Am. Rep. 550; *Id.*, 33 Wis. 582; *Huber v. Railway Co.*, 6 Dak. 392, 43 N. W. 819; *Koontz v. Navigation Co. (Or.)* 23 Pac. 820; *Railroad Co. v. Talbot*, 78 Ky. 621; *Railroad Co. v. Packwood*, 7 Am. & Eng. Ry. Cas. 584; *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66.

The engineer and fireman who operated the locomotive, and other witnesses who dealt with it before and after the fire, testified in detail to facts which tended to show that it was equipped with suitable appliances in perfect condition for arresting sparks, and that it was carefully and skillfully operated on the day of the fire. Counsel for the plaintiffs in error contend, for various reasons which will now be considered, that the evidence of the exercise of ordinary care by the railway company was not conclusive. There was evidence that the country and the weather were dry, that there was a strong wind blowing across the track toward Woodward's buildings from the southwest, that there was great danger of setting them on fire on account of their proximity to the railroad and on account of the combustible materials of which they were composed and with which they were surrounded. It is insisted that this situation demanded of the defendant, a diminution of the speed of its train as it passed the buildings, while the fact was that it passed on schedule time at the ordinary speed of that train at that place, about 35 miles per hour. It is hardly probable that less speed, which would have detained the locomotive opposite the buildings a longer time, would have decreased the danger. Moreover, the primary duty of the railway company was to the state and to the passengers. It was to operate its railroad with reasonable speed at regular times to accommodate passengers and shippers. It owed this duty to the state, and its obligation to discharge it was the consideration of its charter. There is no evidence that the locomotive had previously set any fires, or that there was any reason to suppose that its ordinary operation would fire the buildings of Woodward. The stoppage or material diminution of the speed of its train by a railroad company on dry and windy days at isolated buildings near its track, under such circumstances, is incompatible with the proper discharge of its duty as a common carrier, and this company cannot be held to have been negligent in the discharge of its duty to Woodward in this case, because it drove its engine past his property at its usual speed.

The southern end of the trip of this locomotive on the day of the accident was at La Crosse in the state of Wisconsin. At that place were two dispatchers whose business it was to receive the engine when it arrived and to take it to the roundhouse. There was less danger of the escape of sparks during the operation of the railroad immediately after coals had been spread upon the fire in the box and when the firebox was closed. It is said that the fireman testified at the first trial that he had no recollection of seeing the dispatchers at La Crosse on the day of the fire, that he testified at the second trial that he distinctly remembered see-

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ing them, and upon cross-examination that he had no recollection of seeing them, but that they were there every night as he remembered, that as he approached Woodward's place on the day of the fire he opened the firebox four times and spread four shovels full of coal evenly over the fire in the grate of the locomotive during 26 seconds while he was traveling 80 rods; and it is further said that his testimony is shifty and evasive and shows that he opened the firebox while passing the buildings that were burned. Whether or not this fireman saw the dispatchers on the night of the fire is not material, because without his testimony the evidence is conclusive that one of them received the engine and delivered it to the roundhouse. The only basis for the claim that the fireman opened the firebox while he was passing the buildings is the argument that 26 seconds is too short a time in which to open and close the door of the box four times and to put four shovels full of coal on the grate. But it is not impossible to do so. The fireman testified that it was his customary practice to do so just before he arrived at the burned buildings, that he did so on this occasion, and that the firebox was closed while the locomotive was passing the improvements. His evidence upon this subject was not shaken on cross-examination, and it was not contradicted by any witness, fact, or circumstance. A finding by a jury to the contrary would have been without support in the evidence, and the court would have been obliged to avoid it.

Attention was called to the testimony that sparks about the size of navy beans escaped from the smokestack. But there is no evidence that sparks of this size could not have passed through the most modern and approved spark arrester, and undisputed evidence that this engine was equipped with such a device and that it was in perfect condition.

It is said that the netting provided to arrest sparks was not produced in evidence at the trial. But, as the testimony regarding it was undisputed and presented no issue, its absence was immaterial.

The contention is made that there is no trace of the engine and of the netting from the time they were delivered at the coal dock at La Crosse by the engineer on the evening of the fire. But Hiscox, one of the dispatchers at La Crosse, testified that either he or Cole took the locomotive from the dock to the roundhouse, and that he inspected it and found it in perfect condition. Green, the night foreman of the roundhouse, testifies that Hiscox made a written report that the engine was in good condition, and that no repairs or changes were required or made upon it that night. The engine returned to Minneapolis the next day where it was again inspected and found to be in perfect condition.

There was evidence that at the time of the fire there were no screens and no netting over the dampers to the ashpan, and that some railroad companies had equipped their ashpans with such devices. But the ashpan of this locomotive was carried along beneath the engine between the rails. It was 8 to 10 inches deep, 32 inches wide, and 6½ feet long. As it passed the burned

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buildings it was moving at the rate of 35 miles per hour with the rear damper open and the front damper closed. Two witnesses said that it was possible for coals to escape from it, but no witness testified that he had known of fire being blown or carried more than 8 feet beyond the rails in case of its escape. It is incredible that coals from this ashpan could have traveled over the rail and over the highway and have first set fire 106 feet distant from the railroad. The result is that the evidence was conclusive that if the fire was set by the engine it was kindled not by fire or coals from the ashpan, but by sparks from the smokestack, that the locomotive was equipped with approved appliances in perfect condition to prevent as far as possible the escape of such sparks, and that the engine was carefully and skillfully operated. This action has been twice tried. At the first trial the jury considered the evidence and found that the defendant was guilty of no negligence. At the second trial the court decided that the exercise of reasonable care by the railroad company was so conclusively proved that it could not sustain a verdict for the plaintiffs. It had the same opportunity as the jury to observe the appearance and demeanor, and to judge of the credibility, of the witnesses and its considered opinion should receive consideration and respect. *Patton v. Tex. & Pac. Ry. Co.*, 179 U. S. 660, 21 Sup. Ct. 275, 45 L. Ed. 361. A deliberate review and careful digest of the printed evidence has convinced that there was no mistake in the conclusion of the court below, and that no court could in the exercise of a sound judicial discretion sustain a verdict for the plaintiffs upon this evidence. There was therefore no error in the instruction for the defendant.

When the engine arrived at La Crosse the engineer made a record in his own handwriting, which was delivered to Green, the foreman of the roundhouse. The latter testified on his direct examination that he knew there were no changes or repairs made on the engine that night. On cross-examination he said that he had no personal recollection of the matter, but that he had a record. On redirect examination he was shown the record. He testified that he recognized it as the handwriting of the engineer, that he received it about 8:30 in the evening of the day of the fire for the purpose of learning whether any repairs would be needed upon the engine, and that he turned it over to some other person the next morning. He said that he knew that the record was accurately kept, that if any repairs had been made the back of this record would have shown this fact, and that he could state from an inspection of the record whether any repairs or changes had been made that night. It is specified as error in this state of the record that the court permitted the witness to testify, over the objection that no foundation had been laid which permitted the witness to use this memorandum to refresh his memory, as follows:

"Q. Then referring to defendant's Exhibit A (the record), I will ask you whether there were any repairs or changes made upon that engine that night at North La Crosse?

"A. No, sir; no changes were made at all."

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But there was no error in this ruling. It is perfectly competent for one to examine a deed, mortgage, or other instrument and to testify from the absence of his own handwriting thereon that he never wrote or signed it, and, where one knows that a certain record contains a note of every act done by him or by his department, he may lawfully testify to this knowledge, and from the absence of any record of the act he may depose that the act was not done by him or by those under his control. Such a use of a record may not be competent to refresh the memory because it may not have that effect, but the record and the testimony in the absence of memory constitute the best evidence of the fact that the act was not done, and for that reason they are admissible to prove it.

The fire was set on May 1, 1900. Counsel for the plaintiffs objected to the testimony of witnesses that on April 5th, 11th, 18th, and 24th, respectively, preceding, they examined the netting and all the parts of the engine which in any way affected the arresting of sparks and found them in perfect condition, upon the grounds that the witnesses testified from records and their knowledge, and not from memory, and that the evidence was too remote, and they specify its admission over these objections as error. The first ground of these objections is untenable for the reasons which have been stated. Was the evidence too remote? The last examination was only seven days before the fire. The evidence was that the machinery had continued in the same good condition for 20 days preceding that examination, and it was all admissible in connection with the rule of law that a condition once shown is presumed to continue for a reasonable time, unless the contrary is shown, because it had a strong tendency to prove that the device for arresting sparks continued in good condition until the time of the fire.

Finally, counsel for plaintiffs contend that the court erroneously permitted the traveling engineer of the defendant to testify that for a number of years the defendant had required its firemen on passenger trains, and that it had been their custom, to inspect dampers, ashpans, and dump grates before they started on their trips in order to see that they were clean and in good order, and that the railroad company had required both firemen and engineers to report what, if anything, was needed. But the question at issue here was whether or not the defendant had exercised ordinary care in the operation of its railroad, and this evidence was clearly competent and material upon this issue, because it had a direct tendency to prove the degree of care which it used. It may be that the requirement and the custom tended to show extraordinary care, but the evidence is not inadmissible upon that ground, because the greater care includes the less and is competent evidence of it.

There was no error in the trial of this case, and the judgment below must be affirmed. It is so ordered.

HALEY v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, May 22, 1906. In Banc June 1, 1906.)

[93 S. W. Rep. 1120.]

Railroads—Negligence—Injuries to Persons on Track—Petition—Sufficiency.—Where, in an action against a railroad for injuries received by plaintiff in a collision between the team he was driving and defendant's train, the petition alleged that the train was moving at a speed in violation of a city ordinance, and in a subsequent paragraph alleged that defendant, at the time, negligently ran its train at an unlawful speed, to wit, at a rate of speed greater than 15 miles an hour, further alleging that the street whereon the plaintiff was driving was so narrow that there was not sufficient room between defendant's track, and the curbing for the train to pass without striking his wagon, etc., with specifications of other facts going to show negligence without reference to the ordinance, the petition sufficiently charged common-law negligence, it appearing that, prior to the accident, the ordinance had been repealed.

Negligence—Pleadings—Several Acts of Same Nature.*—In an action for damages through negligence, several acts of negligence of the same nature, all of which may be true, and either or all whereof together may have caused the accident, may be pleaded in one count.

Railroads—Common-Law Negligence—City Streets—Rate of Speed—Care Required.†—It is the duty of a railroad running its train through a street of a populous city to use ordinary care to regulate the speed of the train so as not to injure any one, and failure to use such care is negligence at common law.

Same—Question of Fact—Question of Law.†—In the absence of a statute or ordinance regulating the rate of speed for trains run through the city streets, the question whether or not a given rate of speed is negligence is ordinarily one of fact, and not of common law, and depends on the conditions surrounding the act.

Same—Questions for Jury.—In an action for injuries sustained by plaintiff in a collision between the team he was driving and defendant's train, the evidence held to require submission of question of negligence in running the train at the speed of 20 miles an hour.

Same—Justification for Rate of Speed.†—The fact that the grade of a railroad track laid in a street of a populous city was such that a

*For the authorities in this series on the subject of pleading negligence, see foot-notes appended to *Choctaw, etc., Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; foot-notes appended to *Philadelphia, etc., R. Co. v. Allen* (Md.), 18 R. R. R. 581, 41 Am. & Eng. R. Cas., N. S., 581.

†For the authorities in this series on the subject of the care required in running steam railroad cars in streets to avoid collisions with other users of streets, see foot-notes appended to *Eichorn v. New Orleans & C. R., L. & P. Co.* (La.), 13 R. R. 128, 36 Am. & Eng. R. Cas., N. S., 128; foot-note appended to *Golinvaux v. Burlington, etc., R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185.

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freight train could not ascend it without the aid of the momentum to be acquired by a high rate of speed, did not justify the railroad in running its trains at such speed where the so doing rendered it liable to injure people who without negligence on their part, might be on the street, or rendered it impossible for the engineer to stop the train in time to prevent such injury after seeing the danger.

Same—Pleadings—Inconsistent Allegations.—Allegations in a petition in action against a railroad for injuries to one on the track, charging negligence in the matter of speed, and also charging that defendant negligently failed to stop its train in time to avoid the injury after the danger was apparent, were not necessarily inconsistent.

Same—Negligence—What Constitutes.†—While it is negligence to run a railroad train into a place where danger of a collision is to be expected, at such a rate of speed that the train could not be quickly stopped, on appearance of danger, the railroad is not liable to one injured for failing to stop the train after discovering the peril, if in fact, the speed was such that the engineer could not stop the train.

Same—Contributory Negligence.—The fact that one injured in a collision between the wagon he was driving and a railroad train knew that he was liable to encounter a train in the street where the accident occurred, and that the street was so narrow he could not pass a train, with his wagon, did not render it negligence per se for him to drive in the street.

Same—Sufficiency of Evidence.—In an action against a railroad for injuries sustained by plaintiff in a collision between the wagon he was driving and defendant's train, evidence held insufficient to show contributory negligence as a matter of law.

Graves and Marshall, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Dennis Haley against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin L. Clardy and *Henry G. Herbel*, for appellant.

Edward Celot and *V. Mott Porter*, for respondent.

PER CURIAM. The following opinion by VALLIANT, J., in Division No. 1, is adopted as the opinion of the court in banc.

BRACE, C. J., GANTT and LAMM, JJ., concur. BURGESS and FOX, JJ., concur in the result. GRAVES, J., dissents.

†For the authorities in this series on the subject of the "last clear chance" doctrine, see foot-notes appended to *Barry v. Kansas City, etc., Ry. Co.* (Ark.), 18 R. R. R. 735, 41 Am. & Eng. R. Cas., N. S., 735; foot-notes appended *Green v. Los Angeles Term. Ry. Co.* (Cal.), 18 R. R. R. 192, 41 Am. & Eng. R. Cas., N. S., 192; foot-notes appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; foot-notes appended to *Petty v. St. Louis, etc., R. Co.* (Mo.), 11 R. R. R. 252, 34 Am. & Eng. R. Cas., N. S., 252.

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VALLIANT, J. Defendant has a railroad track extending from the south along the Wharf or Levee, as it is usually called, turning west into Poplar street, thence along Poplar street west to a distant point in the city. While the plaintiff, on February 12, 1901, was driving a two-horse wagon in Poplar street, a locomotive drawing a freight train on defendant's road struck the wagon, causing the plaintiff to be thrown therefrom and severely injured. In the petition it is stated that there was at that time a city ordinance forbidding the running of a locomotive or train on a steam railroad in the city at a greater rate of speed than six miles an hour; that this was a steam railroad, and that this locomotive and train were running at a speed in excess of that rate. After pleading the ordinance and the facts requisite to constitute a violation of it, the petition goes on to state that the defendant then and there "negligently and wrongfully ran its train * * * at a great and unlawful speed to wit, at a rate of speed greater than 6 miles an hour, and greater than 15 miles an hour." Then follow averments to the effect that the width of defendant's engine and cars was such that they so occupied, monopolized, and obstructed the street that there was not left sufficient space in the street for an ordinary wagon or the wagon plaintiff was driving to pass without being struck by the engine, and, under those conditions, the defendant so wrongfully and negligently ran its train as to render it impossible for plaintiff to pass or escape; that it was a long train propelled by a locomotive at the rear end pushing, and another at the front drawing, and that defendant thus so operated the train that the man in charge of the rear engine could not see to the front in time to foresee and avoid collision; that the train was so negligently operated that it was not stopped or arrested as soon as might have been done after the engineer of the front engine discovered the plaintiff on the street and knew or by the exercise of ordinary intelligence would have known that only by prompt stopping of the train could the collision be avoided. The petition then charges that from those wrongful and negligent acts the accident resulted. The answer was a general denial and a plea of contributory negligence. Reply general denial.

The testimony for the plaintiff tended to prove as follows: Poplar street runs east and west; in that part of it to which our attention is now directed it is narrow. There is a stone curbing on each side marking off the space for sidewalks; the sidewalks are of cinders. The width of the street is 20 feet 8 inches from curb to curb. When a train is on the track there is not space between it and the curb on either side for a wagon of ordinary width to pass. Defendant's track comes from the south along the Levee and curves west across a vacant lot into Poplar street. Main street running north and south crosses Poplar street. From the west line of the Levee to the east line of Main street the distance is 226 feet. Main street there is 38 feet 6 inches wide. Between Main and the next parallel street west, there is an alley which

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comes from the north and ends in Poplar street. On the south side of Poplar street opposite the mouth of the alley is a vacant lot. From the east line of this alley to the west line of Main street the distance is 161 feet; so that from the east line of the alley to the west line of the Levee the distance is 425 feet 6 inches. Standing at a point in the center of the alley on the north line of Poplar street looking east one could see an object on the railroad track on the Levee 540 or 545 feet distant. From the Levee to the alley the track rises in grade 1 foot 9 inches to the 100 feet, making a total rise in that distance of 10 feet, 11½ inches. Plaintiff was a teamster for the Charter Oak Stove Company. He was driving a two-horse stake wagon; the driver's seat of which was seven or eight feet above the ground. He was going south in the alley; his aim was to go to the Iron Mountain Depot which was south of Poplar street; when he came to Poplar street, knowing that the railroad was there, and that a train was liable to be coming one way or the other; he stopped a few feet from the mouth of the alley and listened for a train, hearing none, he drove out of the alley into the street and looked each way but saw no train; he drove across the railroad track to the south side of the street turned east and drove 25 or 30 feet when he heard the whistle of the locomotive and immediately thereafter saw it coming around the curve from the Levee into Poplar street; it was coming fast and he realized his danger, he knew there was not space between the track and the curb for his wagon to pass the train; he estimated he was too close to the curb to cross it without swinging out so as to approach it at a more favorable angle and that he could not get into Main street on the south for the same reason; therefore, in the emergency, he turned his team to the northeast aiming to cross the track, and escape into Main street on the north. He had almost succeeded, his horses and the front part of the wagon had got into Main street, but the locomotive caught his east hind wheel, drew the wagon back into Poplar street, forced it through the side of the old brick house breaking a hole into the wall, the plaintiff falling into the breach and the bricks of the broken wall falling on him, inflicting such injuries as resulted in the amputation of his left leg. It was a long freight train with a locomotive at each end and was going 15 or 20 miles an hour. It was necessary for the train to go that fast in order to climb the grade of the curve.

One of the plaintiff's witnesses, a mail carrier, testified that as he was opening a mail box that stood at the southwest corner of Main and Poplar streets he heard the whistle of the locomotive at Gratiot street which was a few squares south, and he saw a watchman then come out of his watchhouse with a white flag in his hand and cross to the north side of the track; witness went into an office which was a few feet from the mail box, delivered some mail there and when he came out the watchman was standing where he last saw him holding the flag in his hand; witness turned west on the south side of Poplar street and saw the plain-

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tiff as he drove out of the alley across the track and turn east; just then the train came in sight around the curve. The plaintiff testified that he did not see the watchman until about the time he also saw the train. The watchman was waving a white flag. Plaintiff was familiar with the locality—said he had been over it a thousand times. On other occasions he had heard the whistle of coming trains at Gratiot street, but did not hear a whistle there at this time; the first he heard a train was the whistle on the curve as it turned into Poplar street which was after he had driven across the track. At the close of the plaintiff's evidence the court gave an instruction that forced the plaintiff to take a nonsuit with leave, but afterwards the court sustained the plaintiff's motion to set aside the nonsuit, and the defendant appealed.

1. The first point of difference between appellant and respondent to which our attention is called is in reference to the allegations of negligence in the petition. As appellant construes the petition it charges only two acts of negligence, viz., a violation of the city ordinance regulating the speed of locomotives and a failure to use ordinary care to avoid the injury after the engineer saw the plaintiff in peril. Respondent construes it to charge also common-law negligence as to speed. The significance of this feature of the plaintiff's case is in the fact that there was at the time of this accident no such ordinance as that pleaded in force in that part of the city, and therefore unless there was in the petition a charge of common-law negligence in the matter of speed there was no charge of negligent speed at all. The fact is there had been a city ordinance limiting the speed of locomotives to six miles an hour at that place, but it had, before this accident, been repealed. That the plaintiff in the beginning relied, in part at least, on that ordinance is shown by the fact that it is specifically pleaded by number, title and legal effect and is followed by averments of facts constituting a violation of its terms. Before the trial, however, the plaintiff discovered that the ordinance had been repealed, and therefore made no offer of it in evidence. But, following the statements in the petition which set forth the supposed ordinance and facts constituting a breach of its requirements is another paragraph in which without reference to the ordinance, it is said that the defendant then and there "negligently and wrongfully ran its train * * * at a great rate of speed; to wit, at a rate of speed greater than 6 miles an hour and greater than 15 miles an hour."

Perhaps if the pleader when he drafted the petition had known that he could place no reliance on the ordinance he would have worded this other clause so as to leave it less liable to doubt that it was intended to state a case of common-law negligence in the matter of the speed of the locomotive. But we think it is sufficient as it is taken in connection with what follows describing the situation. To say that the defendant negligently ran the train at a speed greater than 15 miles an hour, and, in that connection to state the conditions then and there existing, which are such as to

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suggest the degree of care that ought to be exercised, is equivalent to saying that the running of the train at that rate of speed, under those conditions, was negligence.

This ruling is not inconsistent with what was said in *McManamee v. Ry.*, 135 Mo. 447, 37 S. W. 119; *Chitty v. Ry.*, 148 Mo. 74, 49 S. W. 868; or *Cole v. Armour*, 154 Mo. 351, 55 S. W. 476, to which we are cited. In those cases it was said that a plaintiff cannot sue on one cause of action and recover on another, and that we say now. And in the *McManamee* Case we said that when the plaintiff makes the general averment that the injury was caused by the negligence of the defendant, and follows that averment by the averments of specific acts constituting negligence, the petition will be construed to mean that the negligence charged in the general averment was that which was constituted by the specific acts pleaded, and the plaintiff could not recover on proof of other acts constituting negligence not pleaded. That is the law. But in the case at bar the charge of common-law negligence does not rest on an averment of negligence, followed by specifications of facts constituting a violation of the ordinance, but, after the pleader is done with the supposed ordinance and the facts alleged constituting its breach, in a new paragraph he charges that the defendant negligently ran its train at a great and unlawful speed and followed that charge with specifications of facts going to show the negligence without reference to the ordinance we hold therefore that the petition charges common-law negligence. If the supposed ordinance had been in existence the plaintiff would have had the right to plead it as he did and to plead also that the train was running at a rate of speed which, under the circumstances, amounted to negligence at common-law, because the facts stated as constituting a violation of the ordinance might be true and those stated as constituting common-law negligence might also be true. Several acts of negligence of the same nature, and all of which may be true and either of which or all of which together may have caused the accident may be pleaded in one count.

2. It is the duty of a railroad company running its train through a street of a populous city to use ordinary care to regulate the speed of the train so as not to injure any one, and failure to use such care is negligence at common law. In the absence of a statute or ordinance on the subject the question of whether or not a given rate of speed is negligence is, ordinarily, one of fact, not of law and it depends on the conditions surrounding the act. A rate of speed that would be entirely safe under some conditions would be recklessly dangerous under other conditions. In the case at bar the evidence tended to show that the train was running 18 or 20 miles an hour. If that was all there was to sustain the charge of negligence in the matter of speed it would not be sufficient to raise the question and the court would not submit it to the jury. But, in addition to that fact, the evidence tended to show that the train, consisting of 20 or more freight cars, pro-

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pelled by two engines, one in the rear and one in front, came through the curve into the street at a point where the street was so narrow that the train could not pass the wagon without striking it and where, it being a public street, a wagon of that kind was liable to be, and therefore to be expected, and that the speed at which the train was running was such as that the plaintiff did not have reasonable time in which to drive out of danger and such as to render it doubtful if the engineer on the front engine could, by the exercise of ordinary care, have stopped it in time to have avoided the collision after he discovered the danger. Under those conditions it became the duty of the court to submit to the jury the question whether or not it was negligence to run the train at that rate of speed. If the grade was such that the train could not ascend it without the aid of the momentum to be acquired by a high rate of speed that fact would not justify the defendant in running its train at such speed if to do so rendered it liable to kill or cripple people who without negligence on their part were liable to be on the street or if to do so rendered it impossible for the engineer to stop in time to avert such an accident after he should come in view of the danger. In such case there should be a watchman or watchmen stationed and the engineer should wait until the watchman signaled him to come and the watchman should be sure the street was clear before he gave the signal.

The petition charged that the defendant was negligent in the matter of speed and it also charged that the defendant negligently failed to stop the train in time to avoid the collision after the danger was apparent. These two charges are not necessarily inconsistent, because they might both be true; that is, the train might have been moving at a rate of speed that under the circumstances was negligent and yet it might be that the engineer could have stopped it in time to have avoided the accident by the use of ordinary care. But the defendant would not be liable, under what we call the humanitarian doctrine, if the speed of the train was such as to render it impossible for the engineer by the exercise of ordinary care to have stopped it in time, although the speed may have been negligent. Therefore, whilst it is negligence to run a train into a place where danger of collision is to be expected at such rate of speed that it could not be quickly stopped on appearance of danger, still it cannot be said that the defendant is liable for failing to stop the train after discovering the peril if in fact the speed was such that the engineer could not stop it. Appellant insists that the evidence shows that the respondent was guilty of contributory negligence. Respondent was familiar with the locality; he said that he had been there a thousand times. That may have been a hyperbole, but it justifies the conclusion that he knew he was liable to encounter a train in that street, and that the street was so narrow he could not pass a train with his wagon. Under those circumstances the law imposed on him the

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duty of exercising a degree of care commensurate with the danger to be expected. But knowledge of the danger did not render it negligence per se for respondent to drive his wagon in the street. There are many streets in a great city in which driving in any kind of a vehicle is attended with well-known danger; yet that fact does not place one who attempts to do so entirely beyond redress if he is injured by the negligence of another while he himself is using the care that the dangerous conditions demand. Did this plaintiff in driving into that street exercise that degree of care that a man of ordinary prudence under like circumstances and knowing the danger that was to be apprehended, would have exercised?

Before driving out of the alley, he said, he stopped and listened for a train, but heard none. He said that on the east side of the alley was a board fence nine feet high. That fence, however, would seemingly not have obstructed his east view if his estimate of its height, and that of the driver's seat on the wagon were correct. But he testified that when he drove out of the alley he looked each way for a train and none was in sight, that then he drove in a southeast direction across the railroad track to the south side of the street to a point 25 or 30 feet east of the alley, then he heard the whistle and immediately thereafter the engine came in sight coming around the curve into the street. He said he was then too close to the curb stone to cross it without first swinging his wagon out and then turning in, and he could not turn south into Main street for the same reason, therefore in the emergency he decided that his only way of escape was into Main street on the north, and this he attempted with all his might but unfortunately not entirely succeeded.

Gratiot street is several squares south of Poplar street; that is a whistling point for trains coming as this was. Plaintiff testified that on former occasions he had heard the whistle of trains at Gratiot street, but that he heard none there on this occasion. The mail carrier testified that he heard the whistle of this train at Gratiot street, and that when the whistle sounded the watchman came out of his watchhouse which was at the south sidewalk of Poplar street a few feet east of Main street, and crossed over to the north side of the track waving a white flag, and that he was there when the plaintiff drove out of the alley. Plaintiff testified that he did not see the watchman until after he had driven across the street. There was a vacant lot across the street into which the plaintiff might have driven if he had seen the train when he first emerged from the alley, but after he had driven to the south side of the street and to a point 25 or 30 feet east of the alley, he could not have reached the vacant lot without turning his wagon around, and that he said he could not do so as quickly as he could drive northeast into Main street.

The trial court could not under this evidence have said as a

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matter of law that the plaintiff was guilty of contributory negligence. Whether or not he was was a question for the jury. The trial court was right in setting aside the nonsuit. The judgment is affirmed.

BRACE, C. J., and LAMM, J., concur. MARSHALL, J., dissents.

LOUISVILLE RY. CO. v. EDELEN'S ADMR'X.

(Court of Appeals of Kentucky, Oct. 26, 1906.)

[96 S. W. Rep. 901.]

Street Railroads—Persons Near Track—Injury Avoidable Notwithstanding Contributory Negligence.*—In an action for the death of a boy struck by a street car, plaintiff, as administratrix, can recover, if decedent got on the track or was approaching it far enough ahead of the car for the motorman, in the exercise of ordinary care, to have seen him in time either to stop the car or signal its approach and avoid the injury, and he failed to do so, though the boy was negligent.

Same—Signals.*—A street railway company is not liable for death of a boy, where he was standing about eight feet from the track and suddenly ran across the track immediately in front of the car, too late for the motorman to avoid striking him, though he did not sound the bell when he saw the boy standing near the track.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Leo Edelen's administratrix against the Louisville Railway Company. From a judgment for plaintiff, the defendant appeals. Reversed.

Kohn, Baird & Spindle, Farleigh, Strauss & Farleigh, and Greene, & Van Winkle, for appellant.

O'Conner & O'Connor and *J. W. S. Clements*, for appellee.

CARROLL, C. In September, 1904, Leo Edelen, a boy between eight and nine years of age, was run over and killed by one of appellant's electric cars going west on Broadway between Twenty-Fifth and Twenty-Sixth streets, about 194 feet west of Twenty-Fifth street. Appellant asks a reversal of the judgment against it, first because the trial judge refused to give peremptory instruction; and, second, for errors in the instructions.

We have reached the conclusion that the peremptory instruction asked should have been given, and will therefore state in some detail the evidence. Broadway, at the point where the accident occurred, is 50 feet from curb line to curb line, and is

*See preceding case, and foot-notes.

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occupied by two street car tracks. Leo Edelen had been playing a game called "dainty" with two other boys, and these two companions and the motorman were the only eyewitnesses to the accident. The boys had quit playing, and were on the north side of the street when the accident occurred; Leo standing midway between the curb and the car track, and the other boys sitting down on or near the curb immediately opposite the point where Leo was killed. Paul Connelly, one of the little boys, testified as follows: "Q. Were you there when Leo was struck by the street car? A. Yes, sir. Q. Did you see him when he was struck by the street car? A. Yes, sir. Q. Did you see him immediately before he was struck by the street car—a short while before he was struck by the street car? A. No, sir. Q. Did you see him just before, a short time? A. Yes, sir; I seen him; he was standing up there a long time before he got struck. Q. Standing up where? A. In the middle of the street, about middleways between the curb and the car track. Q. What was he doing just before he was struck by the car? A. He was standing up there talking. Q. Talking to whom? A. To me; Ben and I were sitting on the curbing. Q. Was he saying anything? A. He says he was going home to breakfast, and he turned suddenly and started across the street in a sudden run, and he never seen the car and run into the car. Q. How was he looking—which way was he looking? A. He was looking towards us on the curb. Q. On which curb were you—on the south side or on the north side? A. On the north side." In the cross-examination he testified as follows: "Q. He started very suddenly and ran right in front of the car? A. Yes, sir. Q. How close was the car to him when he ran in front of it? A. About four feet. Q. Had Leo started home to breakfast when he started in front of the car, or was he running with the sticks? A. He had started home for breakfast. Q. He lived east of where you were playing—eastward? A. Yes, sir. Q. Of course, his direction to go home would not be towards Twenty-Sixth street—it would be towards Twenty-Fifth street? A. Yes, sir. Q. He was standing out in front of you, between the car track and the curbing? A. Yes, sir; middleways. Q. About middleways between? A. Yes, sir. Q. What part of the car did he run against first? A. The front. He ran right straight across the track, and he hit on that life guard, and it threwed him up." Ben Macklin, the other little boy who was present, testified: "Q. Were you on the street, West Broadway, between Twenty-Fifth and Twenty-Sixth street, on the morning when Leo Edelen was killed? A. I was on the curbing, sitting on the curbstone. He was between the curbing and the car track. Q. Who was? A. Leo. Q. Who was sitting with you? A. Nobody. I was sitting by myself. Paul Connelly was standing behind me on the grass. Q. Where was Leo? He was between the car track and the curbing. Q. He was standing still? A. Yes, sir. Q. Which way was Leo looking? A. He was looking towards across

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the street. He said, 'I am going to eat my breakfast,' and he started to run, and the car struck him. Q. Did you see the car before it struck Leo? A. No, sir. Q. Do you know how long he was in the street between the curb and the street car track? A. About a minute. Q. How far out from the curbing was he—how near to the track? A. He was right in the middle of the street, between the car track and the curbing. Q. Do you know whether Leo saw the car before it struck him or not? A. I don't know." The car stopped at Twenty-Fifth street to let a passenger off, and was running at the usual rate of speed when the accident occurred. The motorman did not ring the bell or give any signal after leaving Twenty-Fifth street before his car struck the Edelen child. It is 17½ feet from the curbing on the north side to the first car track. It was a bright, clear morning, and there were no persons or objects on the street near where the little boys were.

The principal question in the case is, was the motorman guilty of negligence in failing to ring his bell after leaving Twenty-Fifth street, when he saw, or by the exercise of ordinary care could have seen, Leo Edelen standing some seven or eight feet from the track? If it was the duty of the motorman to ring his bell under these circumstances, then his failing to do so was negligence. If the failure to ring the bell was not negligence, appellee is not entitled to recover. In one of the instructions the trial judge said to the jury: "If you believe that the boy, Leo Edelen, got upon the track of the street car, or was in the act of approaching the track in such a way as to indicate to the motorman or apprise the motorman in charge of the car that he was in the act of getting upon the track, far enough ahead of the car that the motorman in the exercise of ordinary care could have seen that fact in time, either by stopping the car or arresting its motion, or giving a signal of its approach, so as to notify the boy and to have avoided injuring him, and you believe from the evidence that the motorman failed to do this, then the law is for the plaintiff, although you may believe that the boy himself was negligent; that is, failed to use such care as I have said a boy of his age, experience, and intelligence usually exercises under such circumstances." We consider this a fair statement of the law applicable to this case; and, testing the facts stated by this rule of law, we are impelled to the conclusion that the motorman was not guilty of negligence. The eyewitnesses for plaintiff each testified that Leo was standing midway between the curbing and the car track, and that he suddenly left his position and ran straight across the track immediately in front of the approaching car. It must be conceded that the motorman could not have stopped his car after the boy started towards the track in time to prevent striking him; and we are of the opinion that the measure of care imposed by law upon the motorman did not require him to sound his bell merely because he saw a boy standing in the street seven or eight feet from the car track—there being

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nothing in the boy's conduct or actions or in the surrounding circumstances to indicate that he was about to or would attempt to cross the track or get on the track in front of the car. If the boys at the time had been playing on the car track or on the street, or if Leo had made any movement indicating that he was going to leave his position of safety, or if there was any evidence sufficient to put the motorman in the exercise of ordinary care on his part upon notice that the boy might attempt to cross the track in front of the street car, a different question would be presented. It is the duty of the motorman to keep a lookout at all times for persons using the streets; but the mere proximity of a boy nine years old to the track is not sufficient notice to charge the motorman with the duty of ringing his bell and taking other precautions in anticipation that the boy may get in front of the moving car.

Our attention has been called to the case of Louisville Railway Company v. Walker, 94 S. W. 635, 29 Ky. Law Rep. 663; but the facts are very different from those here presented. There the car was running at a high rate of speed, and the motorman testified that when about 20 feet from the child he saw her start across the street, going in the direction the car was running. Other witnesses testified that the child left the curbstone and started diagonally across the street when the car was more than 200 feet away, and that the car could have been stopped before reaching the child, who fell on the track. Nor are the cases of S. Co. & Cin. Ry. Co. v. Herklotz, 104 Ky. 400, 47 S. W. 265; Pasamaneck v. Louisville Ry. Co., 98 Ky. 195, 32 S. W. 620; Owensboro City Ry. Co. v. Hill, 56 S. W. 21, 21 Ky. Law Rep. 1638, in point, as they deal with facts very different from those here presented. Under the evidence exhibited in this record, upon the conclusion of the testimony for the plaintiff, the court should have given a peremptory instruction on behalf of the defendant.

The judgment is reversed, with directions for a new trial in conformity to this opinion.

THOMPSON v. PENNSYLVANIA R. Co.

(Supreme Court of Pennsylvania, April 30, 1906.)

[64 Atl. Rep. 323.]

Railroads—Accident at Crossing.—Drivers of fire engines and hose carts are not excepted from the operation of the rule requiring drivers to stop, look, and listen before going on the tracks of a steam railroad.

Negligence—Imputed Negligence—Driver of Vehicle and Occupant—Fire Engine.*—Where a fireman, riding on a fire engine knew that no stop would be made at a railroad crossing by the driver of the fire engine, he assumed the risk.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas Thompson against the Pennsylvania Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BELL, BROWN, MESTREZAT, and STEWART, JJ.

David Lavis, for appellant.

E. Jacquet Sellers, for appellee.

FELL, J. The plaintiff was in the employ of the fire department of the city of Philadelphia, and while riding on a hose carriage on his way to a fire was injured in a collision at a grade crossing of the defendant's road. When about 250 feet from the tracks, the driver slackened the speed of his horses, but without stopping drove on the tracks at a slow trot and the front of the carriage was struck by an engine. The driver on this occasion followed the usual custom of the drivers of the fire department in going to a fire, which was to slacken the speed of the horses at a railroad crossing and look and listen, but not to stop. Of this custom the plaintiff knew. He testified: "In approaching a railroad we always pull up within 200 or 250 feet and listen and look to see if there is anything in view." And the foreman of the engine company called by him testified: "We always slacken up, not at that time, but at the time we got to a fire. My order is for the drivers to slacken up, and they always do about 250 feet or

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Alabama Great Southern R. Co. v. Clark* (Ala.), 19 R. R. R. 170, 42 Am. & Eng. R. Cas., N. S., 170; foot-notes appended to *Dryden v. Pennsylvania R. Co.* (Pa.), 19 R. R. R. 168, 42 Am. & Eng. R. Cas., N. S., 168; *Louisville & N. R. Co. v. Molloy* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

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so before we come to the railroad in case there is a train coming and no flagman there.”

The drivers of fire engines and hose carriages are not excepted from the operation of the rule which requires drivers to stop, look and listen before going on the tracks of a steam railroad. The rule is imperative and without exceptions. In this case the plaintiff knew when he started that a stop would not be made at the crossing, and he assumed the risk to which he exposed himself and made the negligence of the driver his own negligence. The case is clearly ruled by the *Crescent Tp. v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367, and *Dean v. Penna. Railroad Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. 143, 15 Am. St. Rep. 733.

The nonsuit was properly entered, and the judgment is affirmed.

NORFOLK & W. RY. CO. v. SMITH.

(Court of Appeals of Maryland, June 16, 1906.)

[64 Atl. Rep. 317.]

Railroads—Negligence—Injuries to Stock on Track—Statutory Provisions—Contributory Negligence.—Code Pub. Gen. Laws, art. 23, § 287, providing that railroad companies shall be responsible for injuries, resulting in death or otherwise, inflicted on any stock, as cattle, etc., occasioned by their engines, etc., on any of their roads, unless said companies can prove that the injury was committed without any negligence on the part of the company or its agents does not change the common law in respect to the contributory negligence on the part of the plaintiff, and, if his negligence or misconduct contributed directly and immediately to the production of the injury complained of, he cannot recover.

Same—Evidence.*—The mere fact of a horse being on the track of a railroad when injured cannot be considered an act of contributory negligence on the part of the owner, or, standing alone, as proof tending to show negligence, even though the animal was allowed to stray at large unattended, or was negligently cared for, so that it escaped.

Same—Submission to Jury.—In an action against a railroad for damages resulting from the killing of plaintiff's horse on defendant's track, evidence held sufficient to authorize the submission to the jury of the question of defendant's negligence.

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

*For the authorities in this series on the subject of contributory negligence in actions against railroads to recover for loss of or injury to animals struck by trains, see foot-notes appended to *O'Leary v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 141, 39 Am. & Eng. R. Cas., N. S., 141.

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Action by John H. Smith against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PAGE, SCHMUCKER, PEARCE, JONES, and BURKE, JJ.

Samuel B. Loose, for appellant.

Thomas A. Poffenberger and *Wm. J. Witzenbacher*, for appellee.

PAGE, J. The effect of section 287 of article 23 of the Code of Public General Laws was decided in *Northern Central Railway Company v. Ward*, 63 Md. 362, to be "to relieve the plaintiff from the obligation which the common law imposes. * * * The duty rests [now] upon the defendant to supply proper and adequate proof in rebuttal of the presumption of negligence. In other words, it must be assumed that the injury sustained was caused by the defendant's negligence, in the absence of satisfactory and sufficient proof to the contrary. The defendant may supply this proof by showing a state of facts demonstrating care and caution on the part of its agents; and it may also show that the accident resulted from negligence on the part of the plaintiff." *B. & O. R. R. Co. v. Mulligan*, 45 Md. 486, where it is said that the railroad company is entitled to the "unmolested use of its road, and it is the duty of owners to keep cattle within their inclosures, but the failure to do so will not justify persons in charge and management of a railway train to run over them, if, by the exercise of ordinary care, it can be avoided." The statute, however, does not change the common law in respect to contributory negligence on the part of the plaintiff; and therefore, if he has by his negligence or misconduct contributed directly and immediately to the production of the injury complained of, he is precluded from recovering damages, as he was before the passage of the statute. But this court said in *W. Md. R. R. Co. v. Carter*, 59 Md. 306: "If he merely allows his stock to escape from his inclosure and to stray at large unattended, and thus get upon the railroad of the company, and there be injured, while the entry of the stock upon the road may be an act of negligence, as well as a trespass, on the part of the plaintiff, in thus allowing his stock to stray at large unattended, yet such negligence is not of that direct and proximate character as to be so contributory to the production of the injury as to preclude the plaintiff the right to recover, if the accident could have been avoided by the use of reasonable and proper care on the part of the defendant or its agents, under the circumstances of the case." In this case the proof showed that the horse in question, together with other horses, was placed in a field near the railroad, and the gates fastened. During the night it escaped, wandered to the track, and was killed by the appellant's train. There is nothing in this under the decision last cited that tended

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to show the plaintiff was guilty of negligence, even though it has appeared that the animal was allowed to stray at large unattended, or was negligently cared for, so that it escaped. The mere fact of its being on the track cannot be considered an act of negligence, or, standing alone, as proof tending to show negligence in this state, where it is held that, even if the horse had been allowed to escape and to stray unattended, there would not have been such negligence of that proximate character as to be contributory to the injury.

There was evidence showing that near the point where the carcass was were found tracks identified by the shoes as the tracks of the horse that was killed, for a distance of about 1,200 feet along a straight track coming from the direction from which the train approached; and it was contended that the engineer, if he had been exercising due care, would have seen the animal on the track in time to check the speed of the train, and the fact that he did not see the horse, or, if he did, disregard it, was evidence sufficient, if it was believed, to justify the jury in finding that the appellant did not use the proper degree of care in avoiding the accident, and therefore that, if all the evidence in the case be taken, there was no evidence in the cause legally sufficient to show that the injury was committed without any negligence on the part of the company or its agents. But on the part of the appellant there was evidence tending to show that the night was very dark, and the train was running about 35 miles an hour when the horse was struck; that the engineer and fireman were in their proper places, the former keeping a vigilant watch ahead; that the headlight was burning, and the engineer saw horses cross the track 50 yards ahead of the train and move off out of his sight; that he immediately closed the throttle, "grabbed the whistle, and threw on the brakes;" and that he did not see the horse which was killed until after it was struck. The engineer further testified "there was no other precaution I [he] could have taken," that he used both brakes, the "emergency and the surface" brakes, and reversed the engine. The testimony of the defendant, if believed by the jury, might have enabled them to find that the agents of the defendant were using proper care, and that the accident could not have been prevented by the appellant. Whether they would so find or not was a question for the jury, and was submitted to them to determine whether the appellant was free from negligence; and the action of the court in so ruling was correct.

It follows from what has been said that the case was properly submitted to the jury in granting for the plaintiff the two instructions. Its action upon the several prayers of the defendant we are of the opinion was free from error. The judgment will be affirmed.

Judgment affirmed.

MISSOURI, K. & T. RY. CO. *v.* FITHIAN.

(Supreme Court of Kansas, May 12, 1906.)

[85 Pac. Rep. 594.]

Railroads—Liabilities for Fires.*—A railroad company is liable for destruction of a building through the negligence of its employees in burning its right of way, though because of the direction of the wind the fire was burning towards the track; the employees acting under orders of the company's representative.

Error from District Court, Lyon County; F. A. Meckel, Judge.

Action by W. C. Fithian against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, defendant brings error. Affirmed.

John Madden, W. W. Brown, and L. B. Kellogg, for plaintiff in error.

Buck & Spencer, for defendant in error.

PER CURIAM. An icehouse was burned through the negligence of the employees of the railway company who were burning and clearing the right of way. It was not an accidental fire, but was purposely set out under orders of a foreman and to carry out the company's scheme of clearing the company's right of way and protecting it against loss. The fire was set out just beyond the right of way and within a few feet of the icehouse, but the company cannot escape liability on that account. Because of the direction of the wind the men thought it to be more practicable to burn from the outside toward the railroad track, instead of from the track outward, but it proved to be a careless and disastrous plan. The fire was started near the right of way by employees of the company, under orders of its representative, and for its own benefit. For their negligence the company is responsible.

The question of contributory negligence was properly submitted to and settled by the jury.

We find no error in the instructions, or other rulings, and therefore the judgment will be affirmed.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies relating to fires, see foot-notes appended to Cincinnati, etc., Ry. Co. *v.* South Fork Coal Co. (C. C. A.), 17 R. R. R. 280, 40 Am. & Eng. R. Cas., N. S., 280; Birmingham Ry., etc., Co. *v.* Hinton (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; Norfolk & W. Ry. Co. *v.* Fritts (Va.), 18 R. R. R. 246, 41 Am. & Eng. R. Cas., N. S., 246.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* WELCH.

(Supreme Court of Texas, June 28, 1906.)

[94 S. W. Rep. 333.]

Carriers—Injuries—Refusal to Honor Ticket—Damages—Mental Suffering.*—Where defendant's conductor failed to give plaintiff's wife a slip authorizing the next conductor to transport the wife to her destination, whereby such second conductor failed to honor her mileage ticket, defendant was not liable for the mental suffering arising out of the fact that the wife was compelled to borrow the sum of \$3 from a fellow passenger in order to complete her journey; the injury resulting therefrom not being one which the first conductor would be likely to have foreseen would result from his negligent omission to give the slip.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by James Welch against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, affirmed by the Court of Civil Appeals (91 S. W. 621), and defendant brings error. Reversed.

Spoonts, Thompson & Barwise and *T. S. Miller*, for plaintiff in error.

R. L. Carlock, for defendant in error.

BROWN, J. We copy from the opinion of the Court of Civil Appeals the following statement of the case: "James Welch brought suit in the district court of Tarrant county, Tex., against

*For the authorities in this series on the question whether or not there may be a recovery on account of mental suffering, see foot-notes appended to *Kelley v. Ohio River R. Co.* (W. Va.), 19 R. R. R. 807, 42 Am. & Eng. R. Cas., N. S., 807; foot-notes appended to *Ammons v. Southern Ry. Co.* (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724; *Eller v. Carolina & W. Ry. Co.* (N. Car.), 18 R. R. R. 609, 41 Am. & Eng. R. Cas., N. S., 609.

For the authorities in this series on the question what is, and what is not, the proximate cause of an injury, see foot-notes appended to *Central of Georgia Ry. Co. v. Duggan* (Ga.), 19 R. R. R. 803, 42 Am. & Eng. R. Cas., N. S., 803; foot-notes appended to *Little Rock Traction & Elec. Co. v. McCaskill* (Ark.), 19 R. R. R. 513, 42 Am. & Eng. R. Cas., N. S., 513; foot-notes appended to *Warren v. City Electric Ry. Co.* (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; *Byrd v. Southern Express Co.* (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. Cas., N. S., 150; *Wise Terminal Co. v. McCormick* (Va.), 19 R. R. R. 23, 42 Am. & Eng. R. Cas., N. S., 23; foot-note appended to *Louisville & N. R. Co. v. Mounce's Adm'r* (Ky.), 19 R. R. R. 1, 42 Am. & Eng. R. Cas., N. S., 1; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Chicago City Ry. Co. v. Shaw* (Ill.), 18 R. R. R. 586, 41 Am. & Eng. R. Cas., N. S., 586; foot-notes appended to *Brammer v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

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the Missouri, Kansas & Texas Railway Company of Texas, this appellant, and the Missouri, Kansas & Texas Railway Company, wherein he alleged that about the 1st of August, 1904, he purchased from the local passenger agent of the defendant at Ft. Worth, Tex., a mileage book or ticket which entitled his wife to transportation between Ft. Worth and Kansas City, Mo.; that his said wife desired to go to St. Joseph, Mo., a point beyond Kansas City and on a different line of railway; that his wife, in company with her children, boarded one of the trains, and that the ticket or mileage book purchased was recognized by the conductor between Ft. Worth and Denison; that, after leaving Denison, Tex., the conductor of the train came to his wife; and that she handed him the said mileage book, which he (the conductor) refused to receive, and told her that the ticket was no good, and did not entitle her to ride over the line of road, and demanded that she should either pay her fare or be ejected from the train. It was alleged that plaintiff's wife was of a nervous temperament, and that she was traveling alone with her children, and that she had but a few dollars in her possession with which she intended to purchase a sleeper for the night, and that she did not have sufficient money to pay for a second passage from Denison to Kansas City, and also for a sleeper and expenses of refreshment while traveling, which facts she explained to the conductor. Notwithstanding same she was forced to buy a new ticket and pay fare to Kansas City, and that this took about all the money she had, and in order to have sufficient means to buy a ticket from Kansas City to St. Joe, Missouri, and to get some refreshments, she was compelled to borrow the sum of \$3 from a fellow passenger, and that she was deprived of the opportunity of taking a sleeper and had to sit up in the coach the balance of the trip, which lasted all night. She claims that by reason of said facts she was humiliated, mortified, made nervous, sick, etc., to her damage, and for which damage was claimed. Defendants answered, pleading among other things a general denial. There was a trial and verdict of the jury April 19, 1905, in favor of the Missouri, Kansas & Texas Railway, and in favor of the plaintiff against the Missouri, Kansas & Texas Railway Company of Texas, for the sum of \$500. Motion for new trial was filed which was overruled, and the cause is now before this court on appeal on the part of the Missouri, Kansas & Texas Railway Company of Texas."

The defendant requested the court to give the following charge, which was refused: "In this case the plaintiff cannot recover for any mental distress or feeling which his wife may have suffered by reason of having borrowed from other persons in order to complete her journey, and they will disallow any claim therefor." The trial court instructed the jury to find for the plaintiff against the Missouri, Kansas & Texas Railway Company of Texas, "for such a sum of money as will be a reasonable and fair compensation for such physical and mental suffering, if any, as you believe from the evidence Mrs. Welch sustained, as the natural and prob-

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able consequence of being required to pay additional railroad hire, and which you believe ought reasonably to have been foreseen by the conductor of the Missouri, Kansas & Texas Railway Company of Texas, in the light of the attending circumstances, as a result of his failure to give Mrs. Welch the proper check for presentation to the second conductor, as an evidence of her right to continuous transportation to Kansas City. If you believe from the evidence that the conductor of the Missouri, Kansas & Texas Railway Company of Texas, in the light of the attending circumstances, could not reasonably have foreseen that, as a result of his failure to give Mrs. Welch a check to present to the second conductor showing her right to a continuous passage to Kansas City, Mrs. Welch would be deprived of sleeping-car accommodations, or that she would be subjected to the necessity of having to borrow money from other passengers, then you will not allow plaintiff any damages for any suffering, physical or mental, sustained by Mrs. Welch, if any, from such cause or causes." Under this charge the minds of the jury were directed specifically to the mental suffering occasioned to Mrs. Welch by having to borrow money from a fellow passenger, and the question was submitted to them whether the necessity for such borrowing was a reasonable and probable consequence of the negligence of the conductor of the defendant company. The special charge requested by the railroad company, which is copied above, presented to the court the proposition that, as a matter of law, the distress or mental suffering caused by the borrowing of the money was not a subject for damages to be recovered by the plaintiff and, if given, would have withdrawn that issue from the jury. The court erred in not giving the special charge.

The general rule to be applied to this case is that, to sustain the judgment, the injury complained of must be such that, at the time the conductor was guilty of the negligent omission, he ought to have foreseen that the necessity to borrow the money or a like injury would probably result therefrom. *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162. The viewpoint from which the facts must be considered is the time when the conductor acted. Standing in the place of the conductor when he failed to give the slip to authorize the next conductor to transport Mrs. Welch to Kansas City, could one reasonably anticipate that upon being refused a continuous passage Mrs. Welch would be under the necessity of borrowing money from some other person? There is nothing in the facts to suggest such a contingency. Looking back at a state of facts which have transpired, one can see a connection between the consequence and the original cause which would not appear from a most careful consideration of the matter when the first act occurred. In the case of *Hoffman v. Railway*, 47 N. W. 312, the Supreme Court of Minnesota held that the mental suffering which resulted from the necessity of a passenger to borrow money under like circumstances was too remote to sustain a claim for compensation, and we are of opinion

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that the holding was correct. The Court of Civil Appeals cites the case of *Texas & Pacific Railway Co. v. Armstrong*, 93 Tex. 31, 51 S. W. 835, in support of its conclusion. In that case the Court of Civil Appeals certified to this court the following question: "Among other questions presented for decision, appellant has assigned as error that portion of the court's charge which allows the plaintiff to recover compensation for mental pain, anxiety, or distress suffered by his wife. And, whether or not it was error to give this charge, the Court of Civil Appeals for the Third District certifies to the Supreme Court for decision." In answer, this court said: "If the mental pain, anxiety, and distress were caused proximately by the negligent act of the agent of the railway company for which that company was liable, then the mental suffering, anxiety, and distress were proper elements of actual damages to be considered by the jury in arriving at the amount of their verdict." The facts would have justified the submission of a question similar to that before us, but it was not specified in the question. The answer is so guarded as to restrict its effect to such "mental pain," etc., as were proximately caused by the act of the agent. The point made was not that mental suffering arising from want of money could not be recovered, but that, in that class of cases, compensation for such suffering from any cause was not recoverable. That was the point certified and the one decided by this court.

We are of opinion that the facts of this case, as a matter of law, showed that the railroad company was not liable for the mental suffering which arose out of the fact that Mrs. Welch was placed under the necessity to borrow the sum of \$3 from a fellow passenger. Lest our opinion be misconstrued, we say that we do not intend to hold that the pecuniary condition in which Mrs. Welch was when she was denied passage by the second conductor could not be considered, if that condition produced in her mental suffering or mortification, or in any way added to the distress of mind which arose from a refusal of the conductor to carry her according to the contract.

It is ordered that the judgment of the district court and of the Court of Civil Appeals be reversed, and that this cause be remanded to the district court.

GAINESVILLE & DAHLONEGA ELECTRIC RY. CO. v. AUSTIN.

(Supreme Court of Georgia, Dec. 14, 1906.)

[56 S. E. Rep. 254.]

Pleading—Joinder of Counts—Plea of Res Judicata—Striking Out Pleading.—A plaintiff who sues to recover damages for a personal injury may embrace in his petition two or more separate counts, setting forth different accounts of the manner in which he was injured, so as to meet any anticipated variations in the proof which may be adduced at the trial, and a judgment striking one of the counts on the ground that no cause of action is therein stated will not be a bar to his prosecution of the suit upon another count in his petition. (a) An order allowing a plea of res adjudicata to be filed, over the objection of the plaintiff, as a part of the defendant's pleading, is not to be regarded as conclusive upon the former as to the merits of the plea, when the order expressly recites that the court does not undertake to pass upon the question whether or not the plea sets up a good defense. (b) So long as the case is in limine and there is no estoppel of which the party filing the plea may take advantage, it is within the power of the court, of its own motion, to order it stricken as legally insufficient in matter of substance, or to instruct the jury to disregard the defense thereby sought to be interposed. (c) If the plea be without merit and there is no estoppel upon the plaintiff to call into question its legal sufficiency, the defendant cannot justly complain that the trial judge entirely ignored it when instructing the jury as to the issues involved in the case, and thus deprived the defendant of all benefit of the defense of res adjudicata.

Trial—Instructions—Operation—Construing Instructions Together.—That the presiding judge, when undertaking to state the contentions of the respective parties, omitted to say that the defendant contended the injury to the plaintiff was caused purely by an accident will not afford cause for a new trial when it affirmatively appears that the judge, before concluding his charge, gave to the defendant the full benefit of this branch of his defense by instructing the jury that the plaintiff would not be entitled to recover "for purely an accident that neither party was responsible for."

Railroads—Operation—Personal Injuries—Burden of Proof.*—After the plaintiff in a suit against a railway company shows that he was injured by the running of one of the defendant's cars, the burden is on the company to make out its defense, as there will then arise a presumption of law that the defendant was negligent as charged in the plaintiff's petition, and this is true although he may allege, in

*For the authorities in this series on the question whether a presumption of negligence arises from the fact of a collision between a car or train and a person on a railroad track, see foot-notes appended to *Garvick v. United Rys. & Elec. Co.* (Md.), 20 R. R. R. 615, 43 Am. & Eng. R. Cas., N. S., 615; *Chicago & E. I. R. Co. v. Crose* (Ill.), 20 R. R. R. 512, 43 Am. & Eng. R. Cas., N. S., 512.

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different counts, that the injury occurred in either one of two ways, because of various acts of negligence on the part of the company.

Trial—Instructions—Applicability to Pleadings—Separate Counts.—

It was not incumbent on the court, in its charge to the jury, to deal separately with the two counts in the petition, as though two distinct and independent cases were on trial, nor to instruct the jury to inform the court on which count they found, in the event they returned a verdict in favor of the plaintiff.

New Trial—Grounds—Excessive Verdict—Newly Discovered Evidence.—The verdict was neither contrary to the evidence nor excessive in amount, and, in view of the counter showing made by the plaintiff, the defendant was not entitled to a new trial on the ground of newly discovered evidence.

(Syllabus by the Court.)

Error from City Court of Hall; W. W. Stark, Judge.

Action by C. H. Austin against the Gainesville & Dahlonga Electric Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

The substance of the petition filed by the plaintiff is set forth in the report of this case in 122 Ga. 823, 50 S. E. 983. It contained three counts, the second of which was stricken on demurrer, and the first and third held to be good by the trial court. After the affirmance of this judgment by the Supreme Court, the defendant company offered an amendment to its answer, setting up the plea of res adjudicata, which plea was predicated upon the judgment striking the second count of the petition. The trial judge, over the objection of the plaintiff, allowed the amendment to be filed as a part of the pleadings, but in his written order recited that "the facts and law as set out in this amendment are not passed upon by the court as to whether or not they constitute a good plea of res adjudicata." The trial on the merits, which then ensued, resulted in a verdict in favor of the plaintiff for the sum of \$8,250. In its motion for a new trial the defendant company complained that the verdict was unwarranted by the evidence and was excessive, and also excepted to various rulings made by the presiding judge, and to his failure to submit to the jury the issue raised by the plea of res adjudicata, and to state its contention that the injury to the plaintiff was caused purely by accident. The motion also set forth certain assignments of error on the charge of the court, as well as the complaint that the court did not in its charge deal separately with the first and third counts of the plaintiff's petition, instructing the jury as to the law peculiarly applicable to each, and failed to instruct the jury to inform the court upon which count they found, in the event they should return a verdict in favor of the plaintiff. The movant further relied on newly discovered evidence. The court below declined to grant the defendant a new trial, and it thereupon sued out the present writ of error.

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H. H. Dean, for plaintiff in error.

R. R. Arnold, Howard Thompson, and F. M. Johnson, for defendant in error.

EVANS, J. (after stating the facts). 1. The railway company in its plea of *res adjudicata* set forth the adjudication in its favor, to the effect that no cause of action was properly pleaded in the second count of the plaintiff's petition, and also alleged that, while he apparently sought to recover upon three distinct counts, each relating to a separate cause of action, he had not, in point of fact, received more than one injury, and had never had but one, if any, cause of action against the company. The defense urged in this plea was that the judgment striking the second count of the petition operated as a bar to any recovery under either the first or the third count, since, as matter of fact, all related to one and the same transaction, and not to three separate occurrences giving rise to three distinct causes of action, as the petition would seem to indicate. That it was permissible for the plaintiff to bring his action in the manner he adopted, making use of separate counts in order "to meet the probable variations in proof that might occur at the trial," was expressly ruled when the case was before us at the March term, 1905. Under our rules of pleading, it was the right of the plaintiff to avail himself of the fiction that he had three causes of action, notwithstanding that he had only one in point of fact, and the adjudication that the one referred to in the second count of his petition was not well pleaded could have no practical effect other than to limit the plaintiff to the prosecution of one or both of the causes of action which were properly pleaded. That is to say, nothing more has been adjudicated than that he has not three, but only two, causes of action well pleaded. Certainly it has not been adjudged that he never had but one, or that each of the three counts related to one and the same transaction. On the contrary, the second count was stricken upon the theory that it related to a wholly different occurrence from that mentioned in the first or that recited in the third count, and, as the allegations in these two counts, could not for that reason be properly looked to in aid of the second count, the defendant was not put on notice by the allegations therein how the cause of action to which it related originated. See *Cooper v. Portner Brewing Co.*, 112 Ga. 895, 900, 38 S. E. 91. Proof at the trial that the plaintiff received but one injury, and therefore had but one just cause of complaint against the defendant company, could serve no purpose other than to disclose that he had by his pleadings made a legitimate misrepresentation to the court when he alleged that he had, on the same day of the same year, been three times negligently hurt by the company. By failing to perfect his second count by amendment, and thereby losing the right to insist he had been three times injured, he did not forfeit his privilege of pressing his suit to a trial and proving he had been tortuously hurt by the defendant, in the manner alleged in

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the first count, or in the way detailed in the last count. There was obviously no merit in the plea of *res adjudicata*.

But counsel for the company insists that, as the plea was allowed by the court and ordered filed as a part of the pleadings, over the objection of the plaintiff, he is concluded by a ruling, binding until duly excepted to and set aside, to the effect that the plea set up a good defense. The record does not support this contention. In the first place, the order of the court allowing the plea to be filed affirmatively discloses that the trial judge declined to pass upon the legal question whether or not the facts alleged constituted "a good plea of *res adjudicata*," but reserved this point for future determination, and in the second place, the record shows that, when the judge came to charge the jury as to the issues they were called on to decide, he utterly ignored the defense of *res adjudicata*, and thus deprived the defendant of all benefit of it. Under these circumstances, it is clear that, if the court made any express ruling at all upon the legal sufficiency of the plea, that ruling was against the defendant and there was no right of exception in the plaintiff. Such an order as that passed by the trial judge is an irregularity, when timely objection is made to the amendment of pleadings, but this is so simple because it does not settle the question raised by the objection nor adjudicate the right of amendment. The defendant gained nothing by being allowed to file the plea, and the plaintiff lost nothing by having his objections to it ignored by the court. The real question for our determination is whether or not the defendant was deprived of any substantial right by the failure of the judge to submit to the jury its defense of *res adjudicata*, and our conclusion is that this was not an available defense. The court at any time during the progress of the trial could, of its own motion, have ordered the plea stricken as legally insufficient in matter of substance, or could have instructed the jury not to consider the defense therein set up. *Kelly v. Strouse*, 116 Ga. 894, 43 S. E. 280. By ignoring this defense in his charge to the jury, the trial judge did not deprive the defendant of any adjudication as to the merits of the plea which the defendant could urge by way of estoppel against the plaintiff, nor impair the right of the defendant to set up all legitimate matters of defense. *Sims v. Railway Co.*, 123 Ga. 645, 51 S. E. 573. It follows, of course, that the defendant cannot justly complain that the court refused to allow the issue presented by the plea of *res adjudicata* to be first tried, but directed the trial to proceed upon all the issues raised by the pleadings.

2. Complaint is made that the court, when undertaking to state the contentions of the respective parties, omitted to state that the defendant contended that the injury to the plaintiff was caused purely by an accident. We find, however, upon an examination of the charge of the court, that the judge, before concluding it, instructed the jury that the plaintiff would not be entitled to recover "for purely an accident that neither party was responsible

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for," and thus gave to the defendant the full benefit of this branch of its defense.

3. The court correctly charged the jury that, if it appeared from the evidence that the plaintiff was injured by the running of the defendant's cars, the burden would be on the company to make out its defense, as the law would presume "that the defendant was negligent as charged"; but that this presumption could be rebutted by the evidence of either the plaintiff or the defendant. *Central Ry. Co. v. Weathers*, 122 Ga. 475, 47 S. E. 956; *Kemp v. Central Ry. Co.*, 122 Ga. 559, 50 S. E. 465.

4. It was not incumbent on the court, in its charge to the jury, to deal with the first and the third counts of the petition separately, as though two distinct and independent cases were on trial. The two counts differed only in that the plaintiff alleged in the first that he jumped from the car to avoid imminent peril, while in the third he alleged that he was thrown and hurled from the car by an electric shock. See 122 Ga. 826, 50 S. E. 983. The court by its instructions submitted to the jury both of these theories of recovery, and left them to determine which, if either, was sustained by the evidence. As the case was not one in which the defendant had any right to insist upon the return of a special verdict, the trial judge did not commit error in omitting to instruct the jury "to inform the court upon which count they found, whether the first or third," should they bring in a verdict in favor of the plaintiff.

5. A verdict in favor of the plaintiff was authorized by the evidence, and the amount of his recovery was not, in view of the extent of his injuries and the pain and suffering he endured, excessive. The defendant, after the trial, sought to show by way of newly discovered evidence that the plaintiff had been carrying on his usual occupation of architect and contractor, and was not, as he had claimed, totally disabled from doing so. The counter showing made by the plaintiff fully met and overcame the testimony relied on by the defendant, and the presiding judge did not abuse his discretion in declining to grant a new trial.

Judgment affirmed. All the Justices concur.

LADD *v.* NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 1, 1907.)

[79 N. E. Rep. 742.]

Railroads—Operation—Injuries to Persons Working About Cars—Liability.*—Where a railway company chose to make delivery of freight from a car, instead of from its freighthouse, it was bound to keep the car in a safe condition for the use of the consignee's employees in removing the shipment.

Same—Car Owned by Another Company.—A railway company, by using a freight car of another company as a place for delivering a shipment, becomes liable for injuries resulting from defects in the car.

Same—Negligence—Sufficiency of Evidence.*—That a railway employee was notified that the door of a freight car in its use was in bad condition, and that the company did nothing to remedy the defect until after plaintiff was injured thereby, was sufficient to show negligence of the company in not discovering and repairing the defect.

Same—Effect of Plaintiff's Employer's Knowledge of Defect.—Where plaintiff was injured by a defective freight car door, the railway company was not relieved from liability because his employer put him to work about the car knowing of the defect; the employer having drawn the company's attention to it.

Exceptions from Superior Court, Suffolk County; Elisha B. Maynard, Judge.

Action by one Ladd against New York, New Haven & Hartford Railroad Company. Plaintiff excepts to an order directing a verdict for defendant. Exceptions sustained.

Tort for personal injuries to plaintiff, who was injured, while engaged in unloading hay from a freight car in defendant's freightyard, by the falling upon him of the door of the car. The car was a Lehigh Valley Railroad car, and plaintiff was employed by one Robinson, who had bought the hay and went to defendant's yard to get it. In superior court Elisha B. Maynard, J. (since deceased), ordered a verdict for defendant, and plaintiff excepted.

Aldrich, Shurtleff & Baldwin, for plaintiff.

Frank W. Knowlton and *Henry J. Hart*, for defendant.

SHELDON, J. In our opinion the jury might have found upon the evidence that upon the arrival of the car in Boston the defendant, instead of unloading the car and delivering the hay at its

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to persons, other than passengers, at stations and depots on business, see foot-notes appended to *Croft v. Chicago, etc., Ry. Co.* (Iowa), 21 R. R. R. 583, 44 Am. & Eng. R. Cas., N. S., 583.

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freighthouse, chose to make delivery from the car itself, and that this was the reason for the defendant's keeping the car unloaded in one of its yards for six days before shifting it, at the request of Robinson, the purchaser of the hay and the employer of the plaintiff, into another place. If the jury found that this was the fact, then the defendant, by adopting the car as the storehouse from which Robinson was to take the hay, invited him and his men to come thither and there unload the hay. It made the car its temporary freighthouse, which, so far at any rate as could be accomplished by the exercise of ordinary care, it was bound to keep in a safe condition for the use of those men who should properly come to take out the hay which it contained. *Bachant v. B. & M. R. R.*, 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408; *Foster v. N. Y., N. H. & H. R. R.*, 187 Mass. 21, 72 N. E. 331. As was said by Braley, J., in *Bachant v. B. & M. R. R.*, *ubi supra*, "Under its contract as a common carrier the defendant was required to provide a safe and proper place for delivery."

It is not material that this car was, as in *Foster v. N. Y., N. H. & H. R. R.*, *ubi supra*, the property of another. By adopting and using it for its own purposes, as might have been found to be the fact, the defendant had made it one of its own appliances, of which it had assumed full control and for which it was responsible as for its own property. *Bowers v. Connecticut River R. R.*, 162 Mass. 312, 38 N. E. 508; *Fletcher v. B. & M. R. R.*, 1 Allen, 9, 79 Am. Dec. 695; *Schopman v. Boston & Worcester R. R.*, 9 Cush. 24, 55 Am. Dec. 41; *Cotant v. Boone Suburban Ry.*, 125 Iowa, 46, 99 N. W. 115, 69 L. R. A. 982; *Combe v. London & Southwestern Ry.*, 31 L. T. 613. It was the defendant and not the general owner of the car that furnished this car to Robinson's men, including the plaintiff, and that was responsible for its condition. *Hale v. New York, New Haven & Hartford R. R.*, 190 Mass. 84, 76 N. E. 656; *Glynn v. Central R. R. of N. J.*, 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507; *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134. The car had passed out of the control of its general owner and the defendant was using it for its own purposes. *Caledonian Ry. v. Mulholland* [1898] App. Cas. 216. The cases which consider the rule that, as to cars which one railroad company receives from another for transportation over its line, it owes no other duty to its employees than that of providing a sufficient number of competent inspectors, have no application to this case, and need not be referred to.

There was also evidence that the defendant had been negligent in the performance of its duty. Entirely apart from the question whether the defect in this car was a latent defect or whether it could have been discovered by a proper inspection, as to which we express no opinion, there was evidence that two or three days before the happening of the accident the plaintiff's employer had notified Sullivan, one of the defendant's servants, that the door of this car was in bad condition, but that nothing was done by the defendant to remedy the defect until after the accident; and the

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jury might have found that Sullivan, after due notice by the plaintiff's employer, failed to make any proper examination of the car or the door. In view of the duty resting upon the defendant which already has been stated, we are of opinion that the jury might have found that it was guilty of negligence in not having discovered the defect and either remedied it or done something to guard against injury resulting from its existence. And there was other evidence from which the jury might have found, irrespective of the notice received as aforesaid, that the defendant had had sufficient opportunity to discover and remedy the defect or to guard against injurious consequences resulting from it, before electing to use it as a place of delivery.

The defendant does not deny that there was evidence for the jury that the plaintiff was in the exercise of due care; but it strenuously contends that, even if negligence of the defendant had been found, yet that negligence was not the direct and proximate cause of the plaintiff's injury. It relies upon the well-settled doctrine that although its own negligent failure to discover and remedy the defect in this car may have been the original cause without which the injury to the plaintiff would not have happened, yet if between its own negligence and the plaintiff's injury there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff, then the defendant cannot be held liable. It is true that the general rule is to look no further back than to the last wrongdoer, especially when he has had complete and intelligent control of the consequences of the earlier wrongful or negligent acts. *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001; *Stone v. Boston & Albany R. R.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794. And see the cases cited in these opinions. The defendant contends that the injury to the plaintiff is due directly to the negligence of Robinson his employer in putting the plaintiff to work upon this car, having himself a full knowledge of the existing defect and danger, and failing to give to the plaintiff any warning thereof. *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134. But this argument overlooks the fact which, as we have seen, the jury might have found, that the defendant had itself invited not only Robinson but his men, including the plaintiff, to come to this car and remove the hay therefrom. In this respect the case resembles *Heaven v. Pender*, 11 Q. B. D. 503, and *Robertson v. B. A. R. R.*, 160 Mass. 191, 193, 35 N. E. 775. Robinson owed no duty to the defendant to warn his servants of the danger to be apprehended if, as turned out to be the case, it should neglect to repair the defective condition to which he had called the attention of its servants. *Poor v. Sears*, 154 Mass. 539, 549, 28 N. E. 1046, 26 Am. St. Rep. 272. Robinson's original duty to the plaintiff was no greater than was found in *Dunn v. Boston & Northern St. Ry.*, 189 Mass. 62, 75 N. E. 75, 109 Am. St. Rep. 601. So far

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as it may have been increased by his actual knowledge of the existence of the defect and danger, this must be considered in connection with the notice which he had given to the defendant and the opportunity which the defendant had had to make proper repairs. The jury might have found that the defendant's negligence continued up to the time of the injury to the plaintiff, and that the defendant was itself the last wrongdoer both in point of time and in the chain of causation.

In our opinion, the case should have been submitted to the jury.

Exceptions sustained.

ST. LOUIS, I. M. & S. RY. CO. *v.* NEAL.

(Supreme Court of Arkansas, Oct. 15, 1906. On Rehearing, Nov. 19, 1906.)

[98 S. W. Rep. 958.]

Appeal—Evidence—Conclusion—Prejudice.—In an action for the death of a railroad brakeman, defendant was not prejudiced by the court's refusal to admit evidence of the predictions of bystanders who were present when the accident occurred, which were fully verified as shown by the evidence introduced.

Constitutional Law—Legislative Authority—Delegation.—Act Cong. March 28, 1893, provides that, within 90 days from the passage of the act, the American Railway Association shall authorize and designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicularly from the level of the rails to the center of the drawbars, for each of the several gauges of railroad in use in the United States, and shall fix the maximum from such standard height to be allowed between the drawbars of empty and loaded cars, and that after July 1, 1895, no cars, loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for. Held, that such act was not unconstitutional as delegating legislative power to the American Railway Association.

On Rehearing.

Removal of Causes—Remand—Review by State Court.—Where a cause removed to a federal court is by the latter remanded, the order of remand cannot be reviewed on appeal to the Supreme Court of the state.

Same—Successive Petitions.—Plaintiff's original petition alleged that plaintiff's cause of action arose under an act of Congress, and in the trial of the cause there would be a controversy as to the construction of such act. It then alleged the death of plaintiff's decedent on account of wrongful and improper equipment of two cars, which, as a brakeman in defendant's employ, deceased was engaged in coupling, and that such cars were not equipped with drawbars of a uniform

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height as required by the laws of Congress. After the action had been removed to the federal court and by it remanded to the state court, plaintiff amended the first clause of the complaint so as to allege that plaintiff's cause of action arose under an act of Congress, and that in the trial there would be a controversy as to the construction of such act, which would have to be construed by the court, etc. Held that, whether the complaint presented a federal question appeared as clearly before as after the amendment, so that the court did not err in refusing to grant a second petition for removal based on the complaint as amended.

Appeal—Law of the Case.—While a decision on a former appeal is not binding on a subsequent appeal as to the facts, where they are not identical, the law governing the construction of an act of Congress on similar facts as determined on a former appeal constitutes the law of the case.

Battle, J., dissenting.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Jonathan Neal, as administrator, etc., of the estate of George W. Taylor, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Oscar L. Miles, for appellant.

Chew & Fitzhugh and *W. H. Neal*, for appellee.

HILL, C. J. Mr. Justice BATTLE prepared the statement of facts and opinion of the court, and his opinion reflected, at the time it was prepared, the views of a majority of the court.

In all matters except the construction of instruction No. 1 and the refusal to give instruction 28 and 29 asked by appellant, it expresses the unanimous opinion of the court upon the question therein discussed, and his statement of facts and opinion, filed herein as a dissenting opinion, is adopted by the court except as to the instructions referred to.

Mr. Justice McCULLOCH and I take this view of the instructions: The first paragraph of instruction No. 1 states the rule announced in the former opinion of this case with clearness. Following this correct statement is the second paragraph putting the same proposition in another way, and in that statement there is an error, but not a misleading one. In further explanation the court said: "Now, the law required that the two cars between which Taylor lost his life should be, when unloaded, of the equal and uniform height from the level of the face of the rails to the center of the drawbars of 34½ inches, and when loaded to the full capacity should be of the uniform height of 31½ inches." If this had read of not less than 31½ inches, or if this explanatory paragraph had been omitted, there could have been no doubt whatever of the entire correctness of the instruction. But, read in connection with the foregoing paragraph, which so plainly and

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clearly stated the rule, it is difficult to see where this could have misled the jury or been prejudicial. Especially is this the case as the subsequent instructions proceeded on the correct theory that it was the excessive difference which was actionable.

The 28th and 29th instructions requested by appellant simply repeated what the court told the jury in this instruction, and it cannot be error to refuse what was already given. If these instructions had cleared up the inaccuracy in the second paragraph of instruction No. 1, then it would have been error to have refused them, but they merely repeated the substance of the first and third paragraphs of this instruction, and these paragraphs needed no repetition or explanation, as they are complete of themselves.

MR. JUSTICE WOOD and MR. JUSTICE RIDDICK do not, in all things, agree with the foregoing opinion, but they do concur in the judgment. Therefore a majority of the court is in favor of affirmance, and the judgment stands affirmed.

BATTLE, J. (dissenting). The St. Louis, Iron Mountain & Southern Railway Company owned and operated a railway, which was engaged in interstate commerce, and extended from the city of Van Buren, in this state, through the Indian Territory, to the city of Coffeyville, in the state of Kansas. The town of Sallisaw, in the Indian Territory, is on its line of railway. George W. Taylor was employed by it as a brakeman on one of its freight trains. On the 18th of January, 1899, this train left Van Buren for Coffeyville. It had two cars to be left at Sallisaw. When it reached that place the train was uncoupled for the purpose of leaving these cars on the side track, and the engine, with several cars attached, moved forward, leaving the caboose and other cars standing on the main line. The two cars that were to be left were placed on the side track, and the cars attached to the engine were pushed or kicked back towards the caboose and cars left on the main line. The front car of those pushed or kicked back on the main track, it being first in line in the direction they were moving, was equipped with "the old-fashioned link and pin drawbar." It was moved back for the purpose of attaching it to the cars left with the caboose. The car to which it was to be coupled was equipped with an automatic coupler, but its drawhead was so made "that the link and pin coupler could be used when it was necessary to couple to a car having that coupling." As the cars to be coupled were coming together Taylor stepped between them, and inserted a link in the drawhead of the automatic coupler. The cars approaching came with great force, and when they were near the car to which they were to be linked he endeavored to get from between them, but was caught and killed.

Jonathan Neal was appointed administrator of the estate of the deceased, qualified as such, and brought this action against the railway company for the damages to his widow and next of kin caused by his death, alleging that it was the result of the negligence of the defendant in failing to have the drawbars on

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the cars that he attempted to couple "of even, uniform, or standard height, as required by the laws of Congress." The defendant answered and denied that its negligence contributed to the death of plaintiff's intestate, and alleged that it was caused by his own negligence.

The issues in the action were tried by a jury in the Crawford circuit court; the defendant recovered a judgment; plaintiff appealed to this court; the judgment was reversed, and the cause was remanded for a new trial. *Neal v. St. Louis, Iron Mountain & Southern Railway Co.*, 71 Ark. 445, 78 S. W. 220.

Upon a second trial in the circuit court the plaintiff recovered a judgment for \$14,000 and the defendant appealed.

The law of Congress on which this action is based is section 5 of an act of Congress entitled "An act to promote the safety of employees and travelers upon railroad by compelling common carriers in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March 2, 1893, which is as follows:

"That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroad in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. * * *

"And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

Within the time designated by the act the American Railway Association filed with the Interstate Commerce Commission the certificate of their designation, which, in part, is as follows: "Resolved, that the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of drawbars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches."

In the second trial Earl Witt, a brakeman, testified that he saw the cars the deceased attempted to couple, after the accident, and that the automatic coupler appeared to be about three or four inches lower than the other, and that to determine this difference he made no close inspection or measurement. Charles Lattin, another brakeman, testified that he examined them and one appeared to be 1, 1½, or 2 inches higher than the other, and one 2 inches thicker than the other. He says: "When the cars came together, I noticed these two drawbars, the best I could see, passed each other kind of to the side and over the top. In the automatic coupler there is an opening that is called a 'jaw';

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space in there that fastens in the knuckle. The drawbar appeared to go in this opening of the automatic coupler." Again he says: "A brakeman handed me the link [the link with which the deceased attempted to couple the cars]; I found one drawhead broken off. One part of the automatic coupler was broken off. The knuckle on the automatic coupler was broken off. There was a scratch or two on the automatic drawhead. I think the jaw had scratched on it, on the side of the corner. The link had a bright place on the top of it; a bright mark on the link. The link was 12 or 14 inches in length. The bright spot on the link was on the side of it; on the flat side of the link; on top is all I noticed; it was on the flat side of the link. Both prongs of the link were bright." He testified that one car was loaded to its full capacity and that the other had a light load. W. H. McPherson and M. D. Sanders, car inspectors, testified that they examined the cars, a very short time after the accident, while they were standing on the track, and measured the height of the drawbar in each car, at the ends where the same came together in the collision, from the centers of the drawbars to the top of the rail, and found that the height of one was $32\frac{1}{2}$ inches, and of the other $33\frac{1}{2}$ inches, a difference of one inch.

The evidence tended to show that Taylor attempted to couple the cars, and, failing to do so, to get from between them before they collided, and was caught and killed. Witnesses present testified that the moving car was traveling at a speed they variously estimate from three to eight miles an hour.

Defendant offered to prove by many witnesses who saw Taylor going between the cars to make the coupling that they impulsively cried out when they saw him, and made expressions like these, "Watch that man, he will be killed if he goes in there;" "Those cars are going to hit like hell, and if that fellow goes in there he will get killed;" "That brakeman will be killed if he goes in there."

The court instructed the jury over the objections of the defendant as follows:

"(1) The act of Congress fixes the standard height of loaded cars engaged in interstate commerce on standard gauge railroads at $31\frac{1}{2}$ inches and unloaded cars at $34\frac{1}{2}$ inches measured perpendicularly from the level of the face of the rails to the centers of the drawbars, and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be, when unloaded, of the equal and uniform height from the level of the face of the rails to the center of the drawbars of $34\frac{1}{2}$ inches, and when loaded to the full capacity should be of the uniform height of $31\frac{1}{2}$ inches. Now, if the plaintiff by a preponderance of the evidence shows a violation of this duty on the part of the defendant, then this is negligence, and, if the proof by a preponderance also shows that this caused or contributed

to the death of Taylor, then you should find for the plaintiff, unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety, and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant.

"(2) If there was the difference between the height of the center of the drawbars in the two cars in question as indicated in the first instruction, then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point if such difference existed, and but for its existence the injury and death of Taylor would not have happened, then such difference is said, in law, to be an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have co-operated with this one in producing the injury and death of Taylor, and, but for these other co-operating causes, the injury and death of Taylor would not have ensued. But, if such difference in height of the center of the drawbars as aforesaid actually existed, yet, if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the center of the drawbars, then such difference in the height of the center of the drawbars is not in law an efficient proximate cause of the injury and death of Taylor."

The court refused to instruct the jury at the request of the defendant as follows:

"(28) The court charges you that, when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the drawbars of such cars, without regard to the amount of the weight in the partially loaded car."

Defendant asked for instructions as to contributory negligence of the plaintiff, if any, which were covered by instructions given by the court, and for that reason were properly refused.

Many instructions were asked by the defendant, which were properly refused for reasons that appear in the opinion delivered in this case when it was here the first time. *Neal v. St. Louis, Iron Mountain & Southern Railway Company*, 71 Ark. 445, 78 S. W. 220.

The evidence offered by the appellant, which the court refused to admit, was predictions of bystanders which were fully verified, as shown by the evidence. Their evidence could not have added any greater probative force to the verification.

Appellant insists that there is no law or act of Congress requiring railroads engaged in the carriage of interstate traffic to provide their cars with drawbars of standard height, and fixing a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. The reason given for this contention is that Congress had no power to delegate to the American Railway Association the authority to legislate. But no such power was given to the American Railway

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Association. The act vested it with authority to designate the standard height of drawbars and the maximum variation from such standard height, and, when designated in the manner provided by law, provides no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with such standard. The authority to designate is given, without the power to give the designation the force or effect of a law. That is derived entirely from the act. When the designation is made the authority was exhausted. No power to change, amend, enforce, or control exists. The American Railway Association from first to last is without any legislative authority whatever. Such legislation has been frequently sustained by the courts. *Chicago & Northwestern R. Co. v. Dey et al.*, Railroad Commissioners (C. C.) 35 Fed. 866, 1 L. R. A. 744; *McWhorter v. Pensacola & A. R. Co.* (Fla.), 5 South, 129, 2 L. R. A. 504, 12 Am. St. Rep. 220; *State v. Chicago, M. & St. P. R. R. Co.*, 38 Minn. 281, 37 N. W. 782; *Dastervignes v. U. S.*, 122 Fed. 30, 58 C. C. A. 346; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6.

Was the instruction given over the objections of the appellant correct? It says: "The act of Congress fixes the standard height of loaded cars engaged in interstate commerce at 31½ inches and unloaded cars at 34½ inches measured perpendicularly from the level of the face of the rail to the centers of the drawbars, and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty." This is not true. It fixes the standard height of drawbars for freight cars, "measured perpendicularly from the level of the tops of the rails to the center of drawbars, for standard gauge railroads, at 34½ inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars" at three inches. The standard height of the drawbars of loaded freight cars is not fixed by the act, but "the standard height of drawbars for freight cars," and the maximum variation from such height to be allowed between the drawbars of empty and loaded cars, are fixed. The height of drawbars for loaded cars may be greater than 31½ inches, but not less. This was held to be the meaning of the act when this case was first here on appeal. This court said: "We do not think it would be practicable to so construct cars that the distance between the centers of the drawbars should vary in exact proportion to the difference in their loads. It may be practicable to construct them so that, when empty, the centers of their drawbars will be 34½ inches above the top of the rail, and that when one is loaded and another is empty or only in part loaded, the variation between the centers of their drawbars will not exceed three inches. And, though the language used is not very clear, we think that this is all the law requires."

After declaring the law as stated the court proceeded to apply it to this case in the instruction as follows: "Now, the law required that the two cars between which Taylor lost his life should

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be, when unloaded, of the equal and uniform height from the level of the face of the rails to the center of the drawbars of $34\frac{1}{2}$ inches, and, when loaded to the full capacity, should be of the uniform height of $31\frac{1}{2}$ inches. Now, if the plaintiff by a preponderance of the evidence shows a violation of this duty on part of defendant, then this is negligence," etc. The question submitted by this instruction to the jury was, was the height of the centers of the drawbars of the two cars, when unloaded, $34\frac{1}{2}$ inches, and when loaded to the full capacity, $31\frac{1}{2}$ inches? It said nothing about the duty of the jury as to the height of the center of the drawbar of the car partly loaded, but refusal to instruct them in that respect at the request of the appellant, as it should have done, as follows: "The court charges you that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centers of the drawbars of such cars, without regard to the amount of weight in the partially loaded car."

It has been suggested that so much of the second instruction to the jury as is as follows: "If there was the difference between the height of the center of the drawbars in the two cars in question as indicated in the first instruction, then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for"—cures the defect in the first. But it does not. The difference referred to in the second instruction is the three inches difference in the height of loaded and empty cars. That was the only difference submitted by the first instruction to the consideration of the jury. On the contrary, the court refused to instruct them as to the difference allowed between the height of the drawbars of loaded and partly loaded cars. Having instructed them as to the difference of height of the drawbars of loaded and empty cars, it undertook, in the second instruction, to tell them the effect that should be given to their findings upon that subject. If such difference existed it tells them that, in a given case, it would be an efficient proximate cause of the injury and death of Taylor, while in another case it would not be.

The evidence as to the issues in this case is unsatisfactory. To have avoided prejudice, the instructions to the jury should have been accurate, clear, and unambiguous. The instructions we have considered do not meet this requirement, and were prejudicial.

Reverse, and remand for a new trial.

On Rehearing.

HILL, C. J. 1. Appellant calls attention to the matters of jurisdiction heretofore urged, which was fully considered by the court, but not mentioned in the opinion. The suit was brought in Crawford circuit court, and, on petition of defendant, was removed to the United States Circuit Court for the Western District of Arkansas, and a motion to remand to the state court was sustained by said United States Circuit Court. The rule govern-

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ing this matter is thus stated by the United States Supreme Court: "If the circuit court (of the United States) remands a cause, and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment. A state court cannot be held to have decided against a federal right, when it is the Circuit Court (of the United States), and not the state court, which has denied its possession. * * * As under the statute a remanding order of the circuit court is not reviewable by that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of a circuit court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under section 709, Rev. St. [U. S. Comp. St. 1901, p. 575] in respect of such an order when the state court has rendered no decision against a federal right but simply accepted the conclusion of the circuit court." *Missouri Pacific Ry. v. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536; *Nelson v. Moloney*, 174 U. S. 164, 19 Sup. Ct. 622, 43 L. Ed. 934; *Telluride Power Trans. Co. v. R. G. W. Ry.*, 187 U. S. 569, 23 Sup. Ct. 178, 47 L. Ed. 307. In view of the foregoing decisive settlement of the matter, the court did not consider that it was a question proper for its decision, and expressed no opinion on the right of removal and expresses none now.

Attention is called to the fact that there was a second petition for removal which the state court denied. If there had been any change in the removable nature of the suit after the cause was remanded, then a question addressing itself primarily to the state circuit court would have been presented and its decision reviewable here, and the decision of this court reviewable on writ of error by the Supreme Court of the United States, but such was not the case. The original complainant alleged "that plaintiff's cause of action arises under an act of Congress, and, in the trial of said cause, there will be a controversy as to the construction of said act of Congress," and it then proceeded to allege the death of the deceased" on account of said wrongful and improper equipment of said two cars [which he as brakeman was coupling], and the negligent, defective, and dangerous condition of same; that said cars were wrongfully and improperly equipped, and in a dangerous and defective condition in this: "Said cars were not equipped with automatic or safety couplers; the draw-bars on said cars were not even, uniform, or standard height, as required by the laws of Congress." After the remand of the cause to the state circuit court, the plaintiff amended the first clause above quoted so as to make it read as follows: "That plaintiff's cause of action arises under an act of Congress, and in the trial of said cause there will be a controversy as to the construction of said act of Congress, and that, in the trial of this cause, said act of Congress will have to be construed by the court, and that there will be a controversy as to the construction of said act of Congress." Appellant says: "After the cause was re-

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manded from United States court at Ft. Smith to the Crawford circuit court for trial, then the plaintiff amended his complainant, and charged that his cause of action arose under the safety appliance act of Congress, and that it would be necessary for the court to construe the safety appliance act of Congress during the further progress of the cause." All of this is true, but the complainant before amended showed exactly the same thing, and the amendment was trivial and neither added to nor took away anything. Whether it was a federal question was just as clearly in the complainant before as it was after the amendment, and the federal circuit court decided it was not a federal question, and that decision is not reviewable here. When an amendment transforms a nonremovable case into a removable one, then the defendant may have and sustain a second petition for removal. *Moon on Removal of Causes*, § 157; *Powers v. C. & O. Ry.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. But, as indicated, this case falls far away from that rule.

2. It is contended that the court erred in holding the facts sufficient to sustain the verdict. The facts on the former trial are set out in 71 Ark. 445, 78 S. W. 220, and the facts in the last trial, and there were some differences, are set out in the separate opinion of Mr. Justice Battle, and it would be useless to review them now. The court is satisfied they are sufficient to sustain the verdict, and, while there is a difference of opinion among the judges as to the instruction, there is no difference on this question.

3. It is insisted that the former decision is not binding as res judicata on this appeal. As to the facts where they are not identical, that is true, but the law governing the construction of the act of Congress is invoked on the facts formerly presented and on the facts as now presented, and the former construction is the law of this case, and cannot be reopened on this appeal. All matters heretofore and now presented have been considered, and the motion is denied.

MARTIN *et al.* v. SOUTHERN PAC. CO.

(Supreme Court of California, Dec. 27, 1906.)

[88 Pac. Rep. 701.]

Railroads—Accidents at Crossings—Contributory Negligence—Question for Jury.—Whether plaintiff, who was injured by a train while driving over a railroad crossing, was guilty of contributory negligence in failing to look down the track for a train as he approached the crossing, held under the evidence to be a question for the jury.

Same.*—Where a person who was injured by a train while driving over a railroad crossing can at a convenient point near the track discover the approach of the train by the exercise of his senses of hearing and sight, and thereby avoid the danger in which he has placed himself, his failure to do so is contributory negligence, precluding recovery, notwithstanding the employees operating the train may have been negligent in failing to give the statutory signals or warnings of its approach at the crossing.

New Trial—Statement of Grounds—Bill of Exceptions.—A statement, entitled a statement on motion for a new trial, which was also a bill of exceptions and regularly settled and allowed as such, was sufficient to authorize the granting of a new trial, since both statement of facts and bill of exceptions may be incorporated in the same paper.

Appeal—Decisions Reviewable—Nonsuit—Specification of Errors.—The granting of a nonsuit may be reviewed on appeal as error of law, if excepted to and specified as such.

New Trial—Motions for Notice of Intention—Specification of Errors—Sufficiency.—In a notice of intention to move for a new trial embodied in a bill of exceptions, a specification of error that the motion would be made on account of errors in law occurring in the trial and excepted to by plaintiffs was sufficient.

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Susan A. Martin and others against the Southern Pacific Company. From a judgment from an order granting plaintiffs a new trial after judgment of nonsuit, defendant appeals. Affirmed.

A. A. Moore, for appellant.

W. W. Foote and *Vofelsang & Brown*, for respondents.

*For the authorities in this series on the subject of the combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Illinois Cent. R. Co. v. Ackerman* (C. C. A.), 21 R. R. R. 76, 44 Am. & Eng. R. Cas., N. S., 76; foot-notes appended to *Dougherty v. Chicago, etc., Ry. Co.* (S. Dak.), 20 R. R. R. 288, 43 Am. & Eng. R. Cas., N. S., 288.

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LORIGAN, J. This action was brought by plaintiffs, the wife and minor children of Joseph Martin, to recover damages for his death, claimed to have been caused by the negligence of defendant in the operation of its railroad. This appeal is taken by the defendant from the order granting plaintiffs a new trial after a judgment of nonsuit had been entered against them upon the trial of the action in the court below.

The accident resulting in the death of Martin occurred at a crossing next to the town of Irvington, in Alameda county, on September 6, 1894. The railroad track at this point runs north and south and is intersected by a road known as the "Mission Road," running east and west. The Mission Road is 66 feet wide. The right of way of the defendant is 60 feet wide; the main line of track being located in the middle of it, and the rails being a fraction over 27 feet from the east and west lines of the right of way. On the corner formed by the intersection of the easterly line of the right of way and the northerly line of the Mission Road is located what is known as "Vollmer's Warehouse," which extends about 100 feet northerly along the right of way, and easterly about 150 feet on the Mission Road. Further north of Vollmers, and also on the edge of the right of way, is located another warehouse. In front of these warehouses, and between them and the main-line track, was a switch or siding which extended some 500 feet north of the crossing. The platforms of said warehouses, which were $4\frac{1}{2}$ feet in height, extended westerly so as to reach the floors of box cars stationed on the switch; the platform to the north being much wider than the Vollmer platform in order to meet the curve of the switch as it joined the main track. The distance from the corner of Vollmer's warehouse to the nearest rail of this side track was 29 feet 4 inches, and from the center of the near rail of said side track to the nearest rail of the main track the distance was 12 feet 11 inches. At the time of the accident there were several freight box cars of defendant—the evidence is uncertain as to the number—standing on said siding; one of these extending some distance into the Mission Road. These box cars were from 34 to 40 feet long, extended 2 feet beyond the rails of the side track, and stood next the platform in front of Vollmer's warehouse.

The deceased was a farmer and teamster, a man of good hearing and eyesight, who had been accustomed for several years to drive teams on the road over this crossing where he was fatally injured. On the afternoon of the day of the accident he was driving a team of heavy horses harnessed to an empty open-gearred lumber wagon, and was sitting astride on the reach near the center, at least 11 feet from the front end of the wagon pole. The reach of the wagon stood $2\frac{1}{2}$ feet from the ground, and the deceased was a man about 5 feet 9 inches in height. He had driven from the town of Mission to San Jose downgrade toward Irvington and this railroad crossing westerly on the Mission Road at a slow trot. When some 250 feet from defendant's

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right of way, the evidence shows that his view of defendant's track was practically obscured by trees and buildings, including the warehouses mentioned above. As deceased came down about the corner or close to the corner of Vollmer's warehouse on the defendant's right of way (the exact spot seems to have been indicated by a witness on some diagram used on the trial, which diagram is not in the record); he stopped his team and sat in the attitude of one listening. How long he so remained does not appear. It does appear, however, that, though he stopped to listen, he did not look or attempt to look either at this point or at any other time after he started toward the crossing, although there was evidence that through the space between the warehouse and the box cars on the switch, something over 7 feet, an observation might be had by a person standing in the Mission Road along defendant's track for some 2,000 feet northerly in the direction of Niles. After stopping to listen, deceased started his team into a walk towards the crossing, going very slowly up a raise in the road approaching it. As he cleared the box car, which was extending into the Mission Road on the siding, he looked down the track, discovered the train, immediately whipped up his team which was on the main track at the time, and endeavored to clear it. The train, however, struck the hind wheel of the wagon, threw him from it, and in the fall he sustained injuries which caused his death. The train which collided with the wagon of deceased was a special freight train, and there was evidence in the case tending to show that no bell or whistle or other signal was given of the approach of the train towards the crossing, and that it approached it on a descending grade at the rate of from 35 to 40 miles an hour.

With this statement of the general features of the evidence, we approached the merits of the appeal, calling attention to other items of evidence as we proceed. The only question in the case is whether, upon the evidence, the court was warranted in holding, as a matter of law, that the decedent was guilty of contributory negligence in approaching the crossing. While originally so holding, upon the motion for a nonsuit, the trial court was satisfied upon a more particular consideration of the evidence, upon the motion for a new trial, that the question of deceased's contributory negligence was properly for the jury, and we think this conclusion was correct. In granting the nonsuit, as it appears from the grounds of defendant's motion therefor, the court was of the opinion that the evidence showed that while defendant, when near the crossing listened for an approaching train, he was guilty of contributory negligence in failing to look northerly along the track when he reached the corner of Vollmer's warehouse on defendant's right of way, from which point, as we have said, there was evidence that the track could have been seen for 2,000 feet. And the court must have assumed in this connection that the testimony showed that, had the deceased so looked at this point, he would have discovered the approaching train.

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There can be no question but the law is well settled in this state that a traveler upon a highway approaching a crossing must take all reasonable precautions to ascertain whether a train is approaching. In this regard the imperative duty is cast upon him to listen carefully and to look carefully at the most available and convenient distance from the track from which an observation of it can be made, and, when the act of listening and looking may be reasonably effective, that, notwithstanding the employees operating a train may be guilty of negligence in failing to give the statutory signals or warnings of its approach to a crossing, still, if at a convenient point near the track a traveler could have discovered the approach of the train by the exercise of his senses of hearing and sight, and hence avoided the danger in which he placed himself, his failure to do so will constitute contributory negligence precluding a recovery from those who are equally negligent with himself. *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651; *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Green v. Los Angeles Term. Ry. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68. But it will be observed that, as far as the duty of the traveler upon the highway to look is concerned, contributory negligence on his part in failing to do so can only result from the fact that, if he looked from a point of observation near the crossing he could have seen the train approaching and have avoided it. It is only when, if he had made the observation, he could have seen the coming of the train, that he can be said to have been negligent in omitting to do so.

The trial court in granting the nonsuit necessarily assumed that the evidence showed that when deceased reached the corner of the warehouse the train was approaching along the 2,000 feet of track open to observation from that point, and that had he looked he would have seen it; but we think, as the lower court doubtless did on the motion for a new trial, in its review of the evidence, that whether the train at the time when deceased could have looked had reached a point where he could have seen it, had he done so, was, under the evidence, a question for the jury. The witness, Christensen, who made the observation as to the distance one could see up the track from the warehouse corner, testified: "That a man on the siding, or on the main track, or anywhere between or at the corner of the warehouse, can see a man afoot on the track coming towards Niles for a distance of at least 2,000 feet. He can see him until he gets over the little hill that runs down towards Mallard, where the grade would be higher than his head." The evidence of this witness simply fixed the fact that a view of the track from the warehouse corner might be had for the distance stated, but whether the train was anywhere within the field of observation of deceased had he looked from that point was a matter to which other evidence in the case was addressed. Ainsworth, one of the witnesses for the plaintiff and proprietor of a hotel near the crossing, was watching for the coming of the train, as a guest at his hotel

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wished to take it if it stopped. He testified that a train would ordinarily be in view a quarter of a mile below the switch (the switch was 500 feet long), where the track declines and runs down into Niles (doubtless the point called Mallard referred to in Christensen's testimony); that he saw deceased stop his team at the corner of the warehouse and listen; that the witness looked down the track at the same time to see if he could see a train or hear it coming, but did not see anything. The deceased started towards the crossing, walking his horses very slowly, and that his team was in the middle of the track when deceased looked, discovered the train, and then whipped the horses up in an effort to clear it. Another witness, Mrs. Brownell, who was in an upper story of the same hotel of which her husband with Ainsworth was proprietor, was watching for the train, as she did daily, because her little child was always anxious to see it pass. She saw the accident, and testified that she looked down the track and saw the train coming; that it was then half a mile away, and deceased was leisurely approaching the track, and his team was then about 10 feet from it: that this was the first she saw of him. She had not seen him stop to listen. Under this evidence, considered with all the other evidence in the case, it was for the jury to determine, as affecting the question of contributory negligence, whether, had the deceased looked down the track when he approached the corner of the warehouse, he could have seen the train then approaching. If the testimony of these witnesses was uncontradicted, and the jury was satisfied with the accuracy of their observations and their capacity to determine distances, it would warrant them in finding that at the time deceased reached the point when he could have looked the train was not in sight. According to Ainsworth, it was not observable at Mallard, a point 2,000 feet down the track from which it could be seen, and, according to the testimony of Mrs. Brownell, who was looking from an elevation, it was half a mile away. The testimony of these witnesses may be open to the criticism counsel for appellant subjects it to, but their credibility and the weight to be attached to their testimony were matters for the consideration of the jury. It is insisted by counsel that the truth of the testimony of these witnesses is mathematically impossible, as the train could not have covered the distance of 2,000 feet while the deceased was proceeding 27 feet from the corner to the nearest rail of the main track, or at most 30 feet to its center. But, if the testimony that the train was going 35 or 40 miles an hour was true, the train could have covered the distance of 2,000 feet in less time than a minute, while it would not be unreasonable for the jury to conclude that it would take more than that time for the deceased to proceed from the warehouse corner to the point of collision. In any event, whether he could or could not was a fact to be determined by the jury. We think, in view of the testimony referred to, that the case upon the question of the deceased's contributory negligence should have been originally allowed by the court to go to the jury, and, in subsequently

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reaching that conclusion by granting the motion of plaintiffs for a new trial, we do not think the lower court committed any error.

There is no merit in the point made by appellant that the lower court erred in granting the motion for a new trial because the motion was presented on a statement of the case and contained no specification of particulars in which the evidence was alleged to be insufficient to justify the decision of the court in granting a nonsuit, or any assignment or error. The statement, while entitled a statement on motion for a new trial, was also a bill of exceptions, and was regularly settled and allowed as such. Both the statement and the bill of exceptions may be incorporated in the same paper. *Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381. The ruling granting the nonsuit and the exception of defendant to it appeared in the substantive part of the case. If excepted to, and specified as such, the granting of a nonsuit may be reviewed on appeal as error of law. *Gerlach v. Turner*, 89 Cal. 446, 26 Pac. 870; *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218. In the notice of intention to move for a new trial embodied in their bill of exceptions, it was specified, among other grounds of the motion, that it would be made on account of errors in law occurring in the trial and excepted to by plaintiffs. This was all the specification of error that was necessary. Where a party proceeds upon a bill of exceptions, the specification of the particular errors upon which he relies is not necessary. It was said, in *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403, and since followed (except in the case of *Miller v. Wade*, 87 Cal. 410, 25 Pac. 487, subsequently overruled in *Barfield v. S. S. Ir. Co.*, 111 Cal. 119, 43 Pac. 406), that: "No specification of the particular errors of law on which the appellant will rely is made in her bill. But while this is required in a statement of the case (Code Civ. Proc. § 659, subd. 3) it is not in a bill of exceptions. Code Civ. Proc. § 650. The point of respondent, therefore, is not tenable." See, also, *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111; *Barfield v. S. S. Ir. Co.*, 111 Cal. 119, 43 Pac. 406; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Harper v. Gordon*, 128 Cal. 489, 61 Pac. 84.

The order appealed from, granting the new trial, is therefore affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI J.; SLOSS, J.

SOUTHERN RY. CO. *v.* JONES.

(Supreme Court of Appeals of Virginia, Jan. 17, 1907.)

[56 S. E. Rep. 155.]

Railroads—Operation—Accidents at Crossings—Obstructions—Care Required.*—Where the view of a traveler on a highway crossing a railroad was obstructed by a rick of cordwood near the railroad crossing, a higher degree of care was imposed upon such traveler, and also upon the railroad company, than if the obstruction had not existed, the degree of caution required by both parties being in proportion to the danger caused by the obstruction.

Same—Contributory Negligence—Failure to Look and Listen—Negligence of Company—Sounding Whistle.†—Where a traveler on a highway, after stopping and looking for an approaching train at a distance of 75 feet from a crossing where he could not look down the track because of an obstruction, did not again look or listen until he was on the main track, where he was struck by a train, though for at least 40 feet before arriving on such track he could have looked down the railroad a distance of over 700 feet, he was guilty of contributory negligence, precluding his recovery for his injury, even though the company was negligent in failing to sound a whistle as required by Acts 1893-94, p. 827; c. 737.

Error to Circuit Court, Amelia County.

Action by J. O. Jones, Jr., by his father and next friend, against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed, and entered for defendant.

Munford, Hunton, Williams & Anderson, for plaintiff in error.
M. P. Bonifant and Mead Haskins, for defendant in error.

CARDWELL, J. This action was brought by J. O. Jones, Jr., by his father and next friend, to recover damages of the South-

*For the authorities in this series on the question of the care required of a traveler at a crossing where his view is obstructed, see foot-notes appended to *Bartlett v. Worcester Consol. St. R. Co.* (Mass.), 20 R. R. R. 267, 43 Am. & Eng. R. Cas., N. S., 267; foot-notes appended to *State v. Western Md. R. Co.* (Md.), 19 R. R. R. 830, 42 Am. & Eng. R. Cas., N. S., 830; foot-notes appended to *Bilton v. Southern Pac. Co.* (Cal.), 19 R. R. R. 797, 42 Am. & Eng. R. Cas., N. S., 797; foot-notes appended to *Louisville & N. R. Co. v. Crominary* (Miss.), 18 R. R. R. 513, 41 Am. & Eng. R. Cas., N. S., 513.

†For the authorities in this series on the subject of the duty of the highway traveler to look again for trains, just before he attempts to cross railroad tracks, see foot-notes appended to *Hatcher v. McDermot* (Md.), 20 R. R. R. 533, 43 Am. & Eng. R. Cas., N. S., 533; foot-notes appended to *Marshall v. Green Bay & W. R. Co.* (Wis.), 16 R. R. R. 138, 39 Am. & Eng. R. Cas., N. S., 138.

See preceding case, and foot-note.

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ern Railway Company for injuries alleged to have been sustained by reason of the negligence of the defendant company in the operation and management of one of its through passenger trains, commonly known as the "Vestibule." Upon the trial of the cause, the defendant company demurred to the evidence, its demurrer was overruled, and a judgment rendered in favor of the plaintiff for \$1,000, the amount of damages ascertained by the jury subject to the ruling of the court on the demurrer to the evidence. To that judgment, this writ of error was awarded.

The accident out of which the suit arises occurred on the 26th of July, 1902, when the plaintiff, a young man of approximately 15 years of age, was crossing the defendant company's right of way and tracks at a public crossing situated a short distance west of the depot at Mattoax station, in Amelia county. It appears that he was traveling in a two-horse vehicle and was driving the team himself, he being the only occupant; that he had been that morning intrusted by his father with his two-horse wagon for the purpose of driving from his home nine miles to Mattoax station, for the purpose of carrying a young lady of the family to the station, and to get a load of goods for the return trip. After securing his goods from the depot, he started on his return trip, and at the crossing over which he had a short time before passed his wagon was hit by the train in question, and he received the injuries of which he complains, which, though painful, were not serious. The county road along which plaintiff was traveling approaching the crossing from the south strikes the railroad at right angles and on a level. On the right hand side of the crossing, at the time of the accident, was a rick or stack of cordwood, which extended along the line of the railroad's right of way some distance in an easterly direction. By measurement this rick or stack of wood was about 40 feet from the main line of the railroad, and there was a space between the eastern edge of the county road and the end of the rick of wood nearest thereto of at least 50 feet. The train was accustomed to pass Mattoax each day at about 3:30 o'clock p. m., but did not stop at that station, and moved at a schedule rate of about 40 miles an hour. The crossing is situated about 400 yards west of the station, and it was usual and proper to sound the station signal some time previous to the crossing signal, the crossing signal being located about 100 yards east of the station, and therefore about 500 yards from the crossing. On the day of the accident, this train coming from Richmond passed Mattoax Station about 10 minutes late, perhaps a few minutes later, but it does not appear that it was running at a greater rate of speed than was usual in the running of a train of its character and schedule.

The plaintiff based his right of recovery on the grounds. (1) That the employees of the defendant company failed to blow the crossing signal whistle, as required by the statute, on approaching this crossing, or to give timely warning by the ringing of its bell; (2) that the train was running at an excessive rate of speed, instead of at from 20 to 25 miles an hour; (3)

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that the defendant company permitted the cordwood to be racked on its right of way so as to obstruct the view of persons approaching the track.

The statute in force when this accident happened fixing upon railroad companies the duty of giving a signal before reaching a public highway crossing, provided that the whistle shall be sounded at a distance of not less than 300 yards before reaching the crossing. Acts 1893-94, p. 827, c. 737. The present statute fixes a distance of not less than 300 yards nor more than 600 yards as the space within which the signal must be sounded, but the later statute has no application here. As to whether or not the employees of the defendant company failed to give the statutory signal on the approach to this crossing where plaintiff's wagon was struck, or to give other timely warning, the evidence, as is usual in such cases, is not harmonious.

Conceding that the defendant company failed in some duty it owed the plaintiff and was, therefore, guilty of negligence, was not the proximate cause of the accident, in which he sustained the injuries for which he sues, his own contributory negligence? The evidence does not justify the conclusion that the crossing is a dangerous one. The matters alleged in his declaration and testified to by the plaintiff and other witnesses in his behalf, accepted as true, established merely a condition there with respect to the view of approaching trains which at most imposed a higher degree of care alike upon the traveler upon the highway and the defendant company. The only obstruction of the view of approaching trains complained of is the rick of cordwood referred to. It was placed there by W. L. Mason, one of the witnesses for the plaintiff, upon the land of H. E. West, leased to Mason, and "partly on the railroad land." Mason described in detail the location of this wood, and puts it at the nearest point more than a car length (40 or 50 feet) from the public highway, and 30 or 40 feet from the main line of the railroad. His testimony in no way conflicts with, but fully corroborates, that given by Burton Marye, civil engineer, introduced on behalf of the defendant company, who had made a map of the crossing and its surroundings, and taken measurements of the distances, etc., introduced in evidence, and by this evidence it is established that, had the plaintiff looked at a point 40 feet from the main line, he could have seen an approaching train down the track 720 feet, and that the nearer he approached the main line the further east and down the track he could see the approaching train. That the plaintiff could have seen the approaching train from a point at least 40 feet from the main line is nowhere contradicted in the record. According to the uncontradicted proof, even at 20 feet from the main track, he was in a place of safety. Before reaching the main line he had to cross the side track, which, from the evidence of his own witness, is 12 feet from the main line. It is nowhere claimed that the plaintiff was not of an age and of ample intelligence to render him capable of appreciating the dangers of the crossing, if any there were. The view of the

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approaching train being obstructed by the rick of wood, a higher degree of care was imposed upon him, as well as upon the defendant company, than if the obstruction had not existed, the degree of caution required of both parties being in proportion to the danger caused by the obstruction. *A. & D. R. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590; *So. Ry. Co. v. Aldridge*, 101 Va. 142, 43 S. E. 333.

It is true that the failure of a railroad company to sound the whistle of its locomotive in the manner prescribed by law, on approaching a highway crossing, is negligence, and, if a traveler on a highway is injured, there is a presumption that the injury was caused by the neglect, unless the traveler's own fault is manifest. But whether it caused the injury or not is to be determined from all the facts and circumstances in the case. 2 Wood on Railways, 1319; *A. & D. R. Co. v. Rieger*, *supra*.

The plaintiff in this case lived within nine miles of Mattoax, and had lived there about nine years; had been to the station at Mattoax many times, driving by himself and with others, and, on the morning of the accident, had been over the crossing on his way to the station. He was, therefore, familiar with the conditions existing there—whether a dangerous crossing or not—but if this had been his only experience and his first knowledge of the conditions at the crossing, it clearly appears that he understood and appreciated that the railroad tracks were themselves a proclamation of danger. He approached the crossing from a hill, down rather a steep grade going from Mattoax Station, more or less parallel to the line of the railroad, and at a point 75 feet from the crossing he stopped, where his view of the track was obstructed by the cordwood, to look and listen. After taking this, his only precaution, he drove forward, and though for a space of at least 40 feet which intervenes between the track on which he was struck and the point from which he could see down the railroad track a distance of over 700 feet, his evidence does not disclose that he even looked for an approaching train. In fact, it is nowhere suggested in his testimony that when he got where by looking he could have seen the approaching train he adopted such a precaution. All that appears in his evidence as to precautions taken by him appears in his statement: "I stopped in about 25 yards of the crossing and listened, and didn't hear anything at all of the train. I couldn't see. The wood was piled up for I don't know how far up the track, and I started on across the track."

It is a well-established principle that the duty to look and listen imposed upon a traveler of a highway approaching a railroad crossing is a continuing duty, and, if there is any point at which, by looking and listening, a person injured could have avoided the accident, then his contributory negligence defeats a recovery for the injury. If he could have seen and did not see an approaching train, then he failed to discharge the duty which the law imposes.

"The mere fact of looking and listening is not always a per-

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formance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective. He must not approach the track at such a rate of speed that, when he reaches a point where he can see or hear the train, it is too late to protect himself from injury. He must exercise ordinary care in attempting to cross or in crossing the track, and care is never ordinary unless it is proportionate to the known danger." *Stokes v. Southern Ry. Co.*, 104 Va. 819, 52 S. E. 855, and authorities cited.

In the case just cited the facts were very similar to the facts in the case at bar, and the demurrer to the evidence was sustained. The grounds of negligence relied upon were failure to give proper signals at the approach to the crossing, excessive speed, and the negligence of the defendant company in allowing bushes to grow on the right of way near the crossing so as to obstruct the view of travelers approaching. After a recital of the facts the opinion by Buchanan, J., says: "The crossing is a dangerous one, and Mr. Stokes, who lived in the neighborhood and was on his way to the mill, knew this. The county road crosses the railway track a little obliquely in a cut, which extends some distance both north and south of the crossing. * * * An approaching train could not be seen from the point 200 feet from the railway track where Mr. Stokes stopped his wagon, nor could it be seen until he reached the 'cut off' 65 feet from the crossing, at which point he could see along the railway 75 feet." Continuing, the opinion says: "The uncontradicted evidence of the engineman is that when within 100 or 150 yards of the crossing he saw Mr. Stokes and his team, when the mules were about 25 or 30 feet from the track, and that Mr. Stokes looked at or towards him. If Mr. Stokes saw the approaching train as the engineer testifies, then it was clearly his duty to have kept off the railway track. If he did not see the approaching train, he could have seen it if he had been in the exercise of due care. The track itself was a proclamation of danger, and it was his duty, before going upon it, to use his eyes and ears—to look and listen—and to do so when and where his looking would be reasonably effective."

In the case at bar, as we have seen, the plaintiff could, at a point at least 40 feet from the track, have seen the approaching train for 700 feet or more, and the engineer says: "When I saw the crossing, I saw this young fellow Jones. His horses were just about to get on the crossing, and he was looking right straight at the train, as straight as I am looking at one of these gentlemen now, lashing his horses as hard as he could."

Not only is this statement of the engineer uncontradicted, but the plaintiff himself says: "When I got on the main track, I could just see up the railroad, and I looked up and saw the train about 75 yards off. I raised the lines and whipped one horse, and before I could give the other one a lick the train struck the wagon and knocked me up to the telegraph wires." Here again it is to be noted that he made no claim to having listened

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or looked for an approaching train prior to his horses being upon the railroad track, except when he stopped and listened 75 feet from the crossing, and where he could not see down the railroad at all.

In *W., etc., R. Co. v. Lacey*, 94 Va. 466, 26 S. E. 834, the person injured stopped, looked, and listened for the train several hundred feet away from the track, and after that could only have seen up the track of the railroad at a point within 21 feet of the crossing, yet for the lack of due care in continuing to look and listen for the approaching train when he might have looked and listened effectively, it was held that his failure to do this was contributory negligence.

In the case here the evidence leaves no room for doubt that the plaintiff had ample opportunity of seeing the approaching train in time to avoid the accident to him, and either failed to avail himself of the opportunity by the exercise of ordinary care, or, though seeing the train, attempted the hazardous undertaking of passing in front of it and simply made a miscalculation of his ability to do so. In either event he is clearly not entitled to recover in this action.

We are therefore of opinion that the judgment of the circuit court upon the demurrer to the evidence is erroneous, and it will be reversed, and judgment entered here for the defendant company.

ANNAPOLIS, W. & B. RY. CO. *v.* STATE, to Use of HICKOX.

(Court of Appeals of Maryland, Dec. 21, 1906.)

[65 Atl. Rep. 434.]

Railroads—Accident at Crossing—Private Crossings—Contributory Negligence.*—Decedent, who was killed at a private crossing, knew the regular hours for running the trains. Upon turning into the private way he stopped, looked, and listened at a point about 35 or 40 feet from the track, but where his view was obstructed by a pile of cross-ties. After driving past the cross-ties, and about 15 feet from the track, decedent could have seen down the track for a distance variously estimated from 200 to 300 yards; but, without again stopping or looking farther, he attempted to cross the track at a gallop. There was evidence that it was customary for all trains to blow a whistle for the crossing, and that it was not done the morning of the accident. Held, that deceased was guilty of contributory negligence, notwithstanding a failure of the railway company to sound the whistle.

Same—Negligence—Evidence.—The failure of a railway company to give the usual signal upon approaching a station on its road about 1,700 or 1,800 feet from a private crossing, where, had the

*See preceding case, and foot-notes.

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signal¹ been given, it might have been heard, is not evidence of negligence in an action to recover damages for an injury inflicted at such private crossing; the railway company being under no obligation to give a signal at private crossings.

Infants—Actions—Infant Plaintiff—Costs.—Although it is too late after verdict to make the objection that an action brought in the name of the state, to the use of the party injured, for damages by reason of the death of a parent, should have been brought by the next friend of the infant plaintiff, yet, where a judgment for plaintiff is reversed on appeal, costs cannot be entered against the infant nor against the state.

Appeal from Circuit Court, Anne Arundel County; Jas. Revell and Wm. H. Thomas, Judges.

Action by the state, to the use of Clara E. Hickox and another, against the Annapolis, Washington & Baltimore Railway Company. From a judgment for plaintiff Clara E. Hickox, defendant appeals. Reversed, without awarding a new trial.

Argued before McSHERRY, C. J., and BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Jesse Slingluff, for appellant.

A. T. Brady, for appellee.

BOYD, J. This is an appeal from a judgment against the appellant for damages sustained by one of the equitable plaintiffs by reason of the death of her father, Clayton E. Hickox, alleged to have been caused by the negligence of the agents of the railroad company. The suit was brought for the use of Mrs. Gould and Clara E. Hickox, children of the deceased; but the jury was instructed that there could be no recovery by Mrs. Gould, and the only damages assessed were in favor of the other daughter, who was under age at the time of the death of her father. Mr. Hickox was killed on a private crossing leading to his home, several hundred yards west of Camp Parole, a station on the railroad. Other questions were presented by the prayers, but, in view of the conclusion we have reached, it will only be necessary to consider that of the contributory negligence of the deceased.

Mr. Hickox's residence was 700 or 800 feet from the railroad, and he was familiar with the running of the trains on it. His farm was about 2 miles from Annapolis, and he had driven his son-in-law there, and had gone after him in the evening, nearly every day for three months before the accident. With the exception of a short time, he had lived on that farm a number of years. He was injured on December 30, 1904, and died in a short time. He was driving from Annapolis when the accident occurred, and was struck by a regular passenger train which left there at 8:43 a. m. His son-in-law testified that he "was killed at about 8:45 in the morning," referring doubtless to the time of the accident, and the evidence of the trainmen shows that it was running on schedule time. The county road runs close to and

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parallel with the railroad near Camp Parole, and is about 35 or 40 feet from it where the private road, leading to the Hickox place, leaves it. The only witness to the accident, excepting the engineer, was a colored girl named Lulu Queen, who was going from Mr. Hickox's place in the direction of the railroad. She testified that: "Just as he left the county road, he stopped and looked out—looked up and down." On cross-examination she said: "Just as he turned in, he stopped, looked, and listened." When asked whether he did so when he got to the track, she said "No, sir; he didn't do it when he got to the track." And she repeated several times that it was "at the instant" he turned in the road he stopped and looked. The engineer said: "The first I saw was a team coming across with a horse, and I looked round and saw the horse galloping across the track. I reached in and grabbed the air, but it struck the buggy between the two wheels." He also testified that he was about 15 or 20 yards away when he first saw the horse, and that he did everything he could to avoid the accident. From the point where Mr. Hickox turned into the private road, he could ordinarily have seen down the railroad some distance, in the direction of Annapolis; but the plaintiff's evidence was to the effect that there was a number of cross-ties piled between the county road and the railroad, which obstructed his view. After passing the cross-ties, and before getting on the railroad, he could have seen at least as far as Camp Patrole Station, which was variously stated by the witnesses to be 200 or 300 yards; but the superintendent of the company testified that it was 1080 feet from the station to the private crossing, by actual measurement. The train was not scheduled to stop at Camp Patrole, and did not that morning—only stopping there to let passengers off who had by mistake taken it, and it was running 35 or more miles an hour. There was testimony on the part of the plaintiffs tending to show that it was customary for all trains to blow a whistle at the crossing, and that it was not done the morning of the accident. That was denied by the witnesses for the defendant; several engineers and conductors and the superintendent testified that no such signal was ever given for the crossing, but stating that the whistle was always blown for Camp Parole Station, whether the train was to stop there or not.

It is altogether probable, therefore, that the witnesses who were in the habit of hearing the whistle for Camp Parole supposed it was for the crossing. Indeed, that might be said to have been conclusively shown, when the evidence is critically examined. Mr. Hardesty, a witness for the plaintiff, who lived about 200 yards east of the station, said it was the custom of the railroad company in passing his place to blow a whistle. There is no whistling post between that point and the Hickox crossing, and the defendant's witnesses show that it was customary to blow the whistle for Camp Parole somewhere about that point. The conductor testified that the engineer running the engine which struck Mr. Hickox usually blew 300 or 400 yards east of the station,

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and the engineer who was called by both sides testified that he blew the whistle that morning about 300 yards from the station. It would be difficult to reach any other conclusion from the evidence than that the custom was only to blow the whistle for the station, and the statements of the witnesses for the plaintiff that it was customary to blow "for the station and this crossing" does not necessarily mean that it was the custom to blow twice. As the railroad company was under no obligation to give that signal for private crossing (*Pumphrey's Case*, 72 Md. 85, 19 Atl. 8), the omission to blow the whistle for the station would not have been evidence of negligence. The accustomed places to sound the whistle for the station were at least 1,700 or 1,800 feet from the crossing, and the case of *Phila. & Balto. R. R. Co. v. Holden*, 93 Md. 417, 49 Atl. 625, would be conclusive of that question; the only difference between the cases being that in the latter the whistling post was distant nearly 2,000 feet from the point of the accident, while in this case the whistle was usually blown 1,700 or 1,800 feet from the crossing. It was there held that "the failure of a railroad company to give the required signal at a public road crossing about 2,000 feet distant from a private crossing is not evidence of negligence, in action by a party to recover damages for an injury inflicted at such private crossing, where the company is under no obligation to give a signal."

But, without determining that it would be evidence of negligence on the part of the defendant, if we assume that some of the witnesses of the plaintiff did mean to say that another such signal was usually given between the station and the private crossing, the failure to give it on this occasion, if that be also conceded, could not relieve the plaintiff from the contributory negligence of the deceased. The engineer and fireman both testified that the latter was ringing the bell as he passed the station, and that is not in terms denied by the plaintiff's witnesses. Although some of them testified that they did not hear any signal, they were not asked as to a bell, and invariably spoke of the whistle, excepting one who said he heard no bell, but he was then speaking of the crossing. But, regardless of that, there was no evidence whatever to show that Mr. Hickox was misled by the failure of the engineer to blow the whistle. Indeed there was not a particle of evidence to show where the whistle was usually sounded, if it ever was, between the station and the crossing. It is difficult to understand how any one who was not deaf (and there is nothing to show that the deceased was) could have failed to hear the train running 35 or 40 miles an hour, at such a place, if he had listened. His familiarity with the road was such as to require us to impute to him knowledge of the fact that a train was about due. His daughter, who was then sick in bed at his house, was familiar with that train, and any one living as near the railroad as he did, and especially one accustomed to cross the track as frequently as he did, must have known it was due. Indeed, the plaintiffs mainly relied on the failure of the company's agents to

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sound the whistle, which they claimed was customary, as evidence of negligence, and, unless the deceased was aware of the time the train was due, the plaintiffs could not contend he was misled by the absence of the usual signal, and there could be no other possible ground upon which such evidence was relevant, for, as we have seen, the company was under no obligation to give signals at that crossing. If he could see down the track from the point where he "stopped, looked, and listened," and did not see or hear the train, it must have been because there was no train close enough to be seen or heard, and, if by reason of the obstruction of the cross-ties he could not see down the track, he was required to exercise care when he got nearer the track, where he could see and certainly could have heard the train coming, if he was listening, for it is no excuse for one not to stop, look, and listen when he is near the track, because he did so further away, at a point where he could not see, if he looked, and according to the plaintiff's contention could not hear, if he listened. If his view was obstructed, and the sound interfered with, it made it all the more important for him to stop again. There was no difficulty in seeing down the road to Camp Parole Station, after he reached a point about 15 feet from the track. The witnesses differ somewhat as to that distance, between the track and the pile of cross-ties, but the lowest put it at 10 or 12 feet, and one as high as 25 feet. Lulu Queen, the witness to the accident, said the cross-ties were 5 or 6 yards from the track. Even if they were only 10 or 12 feet away, if up to that point they obstructed the view from the private road, it was the duty of the deceased to again stop, look, and listen for the train, which he had reason to expect.

In *Hatcher v. McDermot*, 103 Md. —, 63 Atl. 214, we held that the plaintiff was guilty of contributory negligence for crossing an electric railway on a public crossing without having again stopped, looked, and listened for a car, after he left a point about 130 feet distant from the crossing, where he did stop, look, and listen, but where his view was obstructed to some extent. In *Meidling v. United Ry. Co.*, 97 Md. 76, 54 Atl. 612, we quoted an approval from *Keenan's Case*, 202 Pa. 107, 51 Atl. 742, 58 L. R. A. 217, where it was held to be the duty of the plaintiff "to continue to look until the track is reached," and that court said, in speaking of the contributory negligence of the plaintiff in walking his horse across the track without again looking for a car, after having looked at a point 35 feet from the track: "But his misfortune is that he was careful but for an instant, when he should have continued to be watchful until the track—the real point of danger—was reached." This court has over and over again said that, if the view be obstructed, it is the duty of the traveler to stop, look, and listen before attempting to cross. *Price's Case*, 87 Md. 188, 39 Atl. 610; *Watson's Case*, 91 Md. 355, 46 Atl. 996; *Holden's Case*, 93 Md. 417, 49 Atl. 625; *Manfuso's Case*, 102 Md. 257, 62 Atl. 754; and many others cited

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in them. It had held in a number of cases that it was the duty of a person about to cross the track of a railroad to "look and listen" for approaching trains, but this court did not in the earlier cases adopt the view that it was his duty to stop, look, and listen. That doctrine was, however, finally adopted in a case where "the track in both directions is not fully in view in the immediate approach to the point of intersection of the road;" and it was held that in such case "due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross." *Hogeland's Case*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159. It was said in that case that such rule was necessary for the safety of persons on the trains, as well as for those traveling on the public roads, and that it ought not to be relaxed.

In this case the deceased neglected such precautions as the law required of him, and it should have been withdrawn from the jury on that ground, even if it be conceded that there was negligence on the part of the defendant, which it would be difficult to do. He undoubtedly had the opportunity to ascertain the approach of the train before going upon the track, and, if the evidence on the part of the plaintiff is correct that his view was obstructed when he turned into the private road, there was all the more necessity for caution before putting himself in the way of the train, for, as was said of the plaintiff in *Holden's Case*, *supra*, the deceased "was perfectly familiar with the crossing, and knew or should have known the regular hours for running the trains." The engineer said that the horse was galloping across the track. That is not contradicted, and probably explains the unfortunate occurrence. It so often happens that persons in vehicles assume they can cross a track of a railroad before an approaching train reaches the crossing, and take the risk. Mr. Hickox probably miscalculated the speed of the train, or, relied too much on that of his horse, but, however that may be, it seems clear to us that it was the duty of the court, under the authorities we have cited, and many others that could be cited to the same effect, to have granted the prayer offered by the defendant denying the right of the plaintiff to recover, on the ground of the contributory negligence of the deceased. Having reached that conclusion, it would be useless to discuss other questions.

We do not find from the record that the infant sued by her next friend, and, although it is too late after verdict to make the objection that the name of the *prochein ami* should have been inserted (*Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159), a judgment cannot be entered for costs against the infant, and, of course, cannot be against the State. She cannot recover costs from the appellant; but, as a next friend should have been named to secure costs, we will only reverse the judgment without entering judgment for costs in this court.

Judgment reversed, without awarding a new trial.

ST. LOUIS, I. M. & S. RY. CO. *v.* SPARKS.

(Supreme Court of Arkansas, Dec. 31, 1906.)

[99 S. W. Rep. 73.]

Negligence—Contributory Negligence—Children—Degree of Care Required—Question for Jury.*—Only that degree of care and prudence is expected of a child that a child of his age or degree of intelligence should exercise, so that what might be ordinary care for such a child might be culpable negligence in an adult; and hence the question of contributory negligence of a boy between 9 and 10 years of age, injured by a railroad train backing down upon him, in not looking up and down the track as he walked upon it, was one for the jury under proper instructions.

Trial—Instructions—Charge Considered as a Whole.—In an action for personal injuries, an instruction stating that the burden was on defendant to establish plaintiff's contributory negligence by a preponderance of the testimony to the satisfaction of the jury was not error because of the use of the words "to the satisfaction of the jury," where the charge, when considered as a whole, clearly showed that the court did not intend to require more than a preponderance of the testimony.

Appeal—Objections in Trial Court—Necessity.—In an action for personal injuries, where no special objection specifying the grounds thereof was made in the trial court to an instruction, such objection cannot be raised on appeal.

Railroads—Evidence—Admissibility.—In an action for injuries to a boy, caused by a train backing down upon him, evidence that, previous to the accident, plaintiff had been in the habit of riding cars was inadmissible where there was no evidence that he attempted to jump upon or ride on the car by which he was injured.

Same—Railway in Populous Town—Increased Vigilance—Keeping Lookout.†—In an action for injuries to a boy caused by a train backing down upon him, evidence that the railway track on which plaintiff was injured was in a populous town and that pedestrians, both young and old, frequently used it as a passway was admissible to show the necessity for increased vigilance in keeping a lookout when cars were to be pushed or backed along the track at that place.

Damages—Personal Injuries—Excessive Award.—In an action for injuries to a boy between 9 and 10 years of age, caused by a train

*For the authorities in this series on the subject of the care required of minors for their own protection, see foot-notes appended to *Louisville Ry. Co. v. Esselman* (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627; foot-notes appended to *Birmingham, etc., Co. v. Jones* (Ala.), 20 R. R. R. 569, 43 Am. & Eng. R. Cas., N. S., 569; *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293.

†See extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218.

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backing down upon him, by which he lost his foot and suffered greatly, damages of \$10,000 were not excessive.

Appeal from Circuit Court, Hempstead County; Joel D. Conway, Judge.

Action by Willie Sparks against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant.

O. A. Graves, O. D. Scott, and W. H. Arnold, for appellee.

RIDDICK, J. This is an action brought by Willie Sparks, a minor, by his next friend to recover damages for an injury caused by one of the cars of the defendant railway company. At the time of the accident Willie Sparks, a boy between 9 and 10 years of age, was returning from the place where he attended school to his home. He and a number of other school children walked along the side of the railway track and then attempted to cross the track. The employees of the company had left a caboose with three freight cars attached standing on the track near where the boy attempted to cross. Just before the boy attempted to cross the track another car was pushed or kicked against these cars and caboose which were standing on the track and caused them to back down the track. While thus moving the caboose struck the plaintiff, Willie Sparks, and the result was that his foot was crushed to such an extent that it was necessary to amputate it. The jury returned a verdict in favor of the plaintiff, and assessed his damage at \$10,000. Judgment was rendered against the company for that amount, and it appealed.

It is said that the plaintiff, Willie Sparks, was guilty of contributory negligence, but that question was submitted to the jury under proper instructions, and, considering that plaintiff was, at the time of the accident, under 10 years of age, we think that the circumstances are sufficient to support the finding of the jury. It has been frequently held that a child is not required to exercise the same capacity for self-preservation and the same prudence that an adult should exercise under like circumstances. You can reasonably expect of a boy between 9 and 10 years of age only that degree of care and prudence that a boy of that age or of his degree of intelligence should exercise. What would be ordinary care for such a boy might be culpable negligence in an adult. *Dowling v. Allen*, 88 Mo. 293; *Ridenhour v. Kansas City Ry. Co.*, 102 Mo. 283, 13 S. W. 889, 14 S. W. 760; *Washington R. Co. v. Gladmon*, 15 Wall. (U. S.) 401, 21 L. Ed. 114; *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Am. & Eng. Enc. Law* (2d Ed.) 405.

The evidence tends to show that the defendant company was guilty of negligence in allowing these cars to be pushed or kicked along its track through a populous town without any lookout on

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them to guard against accidents to persons and property, and we think the question as to whether the plaintiff was guilty of contributory negligence in failing to look up and down the track as he walked upon it was a question for the jury.

An instruction of the court told the jury that contributory negligence was an affirmative defense, and that the burden of proof was on the defendant to establish it "by a preponderance of the testimony to the satisfaction of the jury." Counsel for defendant contends that this instruction was erroneous, for the reason that, while usually the burden is on the defendant to show contributory negligence, yet it is sufficient if shown by the evidence introduced by plaintiff, and further, that the use of the word "satisfactory" was improper and rendered the instruction erroneous and prejudicial. But it is evident when the whole charge is considered that the court did not intend by this instruction to convey the idea that the defendant must introduce evidence to show contributory negligence even though it was shown by the evidence of plaintiff. It is equally plain, we think, that the court did not, by saying that contributory negligence must be "established by a preponderance of the testimony to the satisfaction of the jury," intend to require more than a preponderance of the evidence. In fact the instruction says that such defense must be shown "by a preponderance of the testimony." The use of the word "satisfy or satisfaction" in such connection has been criticised as inaccurate, and there was no need to use it to express the idea intended. But no special objection was made to this instruction on the grounds mentioned, and it is too late to raise such formal objections on appeal. *Brinkley Car Works v. Cooper*, 75 Ark. 325, 87 S. W. 645; *Thomas v. State*, 74 Ark. 436, 86 S. W. 404; *St. L., I. M. & Sou. Ry. Co. v. Norton*, 71 Ark. 317, 73 S. W. 1095; *Ætna Ins. Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371; *Wells v. Higgins*, 132 N. Y. 459, 30 N. E. 861.

There was no evidence in this case that the plaintiff attempted to jump upon or ride this car, and the evidence offered by defendant that he had previously been in the habit of riding cars was properly rejected.

It was proper to show that this railway track was in a populous town, and that pedestrians, both young and old, frequently used it as a passway to show the necessity for increased vigilance in keeping a lookout when cars were to be pushed or backed along the track at that place.

The damages allowed were liberal, but, considering the fact that plaintiff, a young and bright boy, lost his foot, that he suffered greatly, we are not able to say that the damages assessed were excessive.

Finding no error, judgment affirmed.

HOLIAN *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1907.)

[80 N. E. Rep. 1.]

Street Railroads—Injuries to Child—Contributory Negligence.*—

Where a girl, 10 years of age, when about to cross a street, looked and saw a street car approaching at a distance of about 80 feet, and then walked across the street, neither pausing or hurrying, and passed in front of the car, which ran over her, she was guilty of contributory negligence as a matter of law.

Exceptions from Superior Court, Suffolk County; Jabez Fox, Judge.

Action by Julia Holian against the Boston Elevated Railway Company. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Coakley, Coakley & Sherman and *C. C. Johnson*, for plaintiff.
Fletcher Ranney and *Wesley E. Monk*, for defendant.

SHELDON, J. This is a close case upon the question whether the plaintiff was in the exercise of that degree of care which could properly be expected of a child of her years; but we are of the opinion that the verdict for the defendant was rightly ordered.

The evidence showed that the plaintiff, just before stepping off the curbstone into the roadway, looked up the track and saw the defendant's car approaching. It was then about 80 feet distant from her. She walked across the street so as to pass in front of the car, which was in plain sight all the time, with nothing whatever to prevent her from seeing it if she had looked at all. She simply walked across the street in face of the approaching car, without taking any precaution for her own safety, when she might have avoided the accident either by quickening her pace or by waiting for the car to pass. There was evidence of previous care on her part in looking for the car before she left the sidewalk; but we cannot find that she did anything at all for her own safety, or even had it in mind after she started to cross the street. She knew that the car was approaching; she had considered the question whether she would have time enough to

*For the authorities in this series on the question whether young children can be chargeable with contributory negligence, see foot-notes appended to *Chambers v. Milner Coal & Ry. Co.* (Ala.), 20 R. R. R. 277, 43 Am. & Eng. R. Cas., N. S., 277. See also, preceding case, and foot-notes.

For the illustrations in this series of the question whether or not a child was guilty of contributory negligence, see foot-notes appended to *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293.

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get across, and acted upon her affirmative conclusion; then apparently she dismissed the subject entirely from her mind and left her safety wholly to chance or to the care of the defendant's motorman.

The case does not differ in principle from *Murphy v. Boston Elevated Ry.*, 188 Mass. 8, 73 N. E. 1018, or from *Stackpole v. Boston Elevated Ry. (Mass.)* 79 N. E. 740, in which the plaintiff, a boy of 11 years, passed behind a car on one track and was hit by a car on the other track which he claimed that he had failed to see; and it was held that his own negligence prevented him from recovering. The cases relied on by the plaintiff's counsel, while recognizing the undoubted rule that a child is not to be held to the same degree of care that an adult ought to exercise contain nothing at variance with the rule here stated. *McDermott v. Boston Elevated Ry.*, 184 Mass. 126, 68 N. E. 34, 100 Am. St. Rep. 548, simply held that it is not necessarily negligent for a child 6½ years old to fail to look or listen for a car before following other children across an electric railway track. *Mattey v. Whittier Machine Co.*, 140 Mass. 337, 4 N. E. 575, turned upon the fact that there was conflicting evidence as to the circumstances of the accident. In *O'Connor v. Boston & Lowell R. R.*, 135 Mass. 352, there was no indication of danger when the plaintiff started to cross the track, and he was held by his foot being caught between a rail and the planking. Other cases cited by the plaintiff depend upon the care of the parents or other persons in charge of a child of tender years, and are not applicable here.

The plaintiff seems to have stepped either heedlessly or recklessly in front of a car which, when she left the sidewalk, she knew was coming, which was all the time clearly within her sight with nothing to distract her attention. She neither paused nor hurried, nor did anything to avoid the accident. *Mullen v. Springfield St. Ry.*, 164 Mass. 450, 41 N. E. 664; *Morey v. Gloucester St. Ry.*, 171 Mass. 164, 50 N. E. 530; *Young v. Small*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457. There was no evidence that at the time of the accident she was exercising any care. *Mathes v. Lowell, Lawrence & Haverhill St. Ry.*, 177 Mass. 416, 59 N. E. 77.

It is unnecessary to consider the question of the defendant's negligence.

Exceptions overruled.

BROWN v. SOUTHERN PAC. CO. et al.

(Supreme Court of Utah, Dec. 14, 1906.)

[88 Pac. Rep. 7.]

Railroads — Operation — Personal Injuries — Companies Liable. —

Where plaintiff brought action jointly against three railroad companies for personal injuries received at a depot, and showed negligence on the part of those operating the train, which was made up of cars belonging to one company, propelled by an engine of another, by a crew paid by the third, and showed that the depot was maintained for the common benefit of the defendants, between whom some sort of agreement existed, he had made a prima facie case of joint liability without showing just what were the contract relations of defendants.

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by William Brown against the Southern Pacific Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

P. L. Williams and *C. S. Varian*, for appellants.

A. G. Horn, for respondent.

MCCARTY, C. J. Plaintiff brought this action against the defendants jointly to recover damages for personal injuries suffered through an accident at a railroad crossing alleged to have resulted because of the joint negligence of the defendants. The paragraph of the complaint charging negligence is as follows: "That on the 7th day of December, 1905, at said Ogden city, Utah, and whilst the said plaintiff was crossing the railroad track controlled by the defendants upon a public street, highway, and thoroughfare, at a point where there was and is frequent and much travel, and in a populous part of said city, and by reason of the carelessness and negligence of the defendants in operating, managing, running, and switching their engines and cars over, across, and upon said street, highway, and thoroughfare, and by reason of their negligence in failing to adopt or use any precaution to prevent injuries thereon and in failing to have stationed any flagman or other person, or any guard or gates to give warning or protection from injuries to the traveling public or to persons having occasion to travel along said public street and over and across said railroad track, and by failing to sound the whistle or ring the bell as required by law, all of which was then and there necessary to prevent injury to persons crossing the highway aforesaid, and without giving any notice or warning whatever, and by reason of the carelessness and inefficiency in the management, handling, running, and

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switching of the trains, cars, and engines, and whilst the plaintiff was traveling and passing over the said railroad tracks of the defendants on the road crossing aforesaid, the defendants carelessly ran and backed its cars and engines upon and over the plaintiff and the vehicle in which he was then and there riding," thereby injuring him to his damage, etc. Each defendant filed its separate answer and admitted: "(1) It is and was at the times mentioned in said complaint * * * engaged in the business of maintaining and operating a railroad, together with tracks, engines and cars in the city of Ogden and elsewhere; * * *" and (2) alleged that "at the time and place of the accident referred to in said complaint * * * [it] was not operating, managing, running, or switching any of its engines or cars across or upon the said street or thoroughfare as alleged in said complaint, or at all." A trial by a jury was had, and at the close of plaintiff's case the defendants, other than the Oregon Short Line, severally moved for a judgment of nonsuit, on the grounds that neither company was operating or controlling the movements of the train with which plaintiff collided at the time he was injured. The motions were overruled, and the case finally submitted to the jury, who returned a verdict for plaintiff and against all of the defendants jointly for general and special damages in the sum of \$2,500, which the court reduced to \$2,069. Judgment on the verdict as rendered by the court was entered against all of the defendants jointly, who have severally appealed to this court.

It is conceded that "evidence was given and received on behalf of plaintiff tending to support the allegations of negligence in the matter of the operation and running of the train, made on his part." And, as stated by counsel for appellants in their brief, "the errors assigned upon this appeal are directed to the question of the joint liability of the defendants as charged in the complaint and affirmed by the verdict and judgment." The facts relating to the operation and control of the train of cars in question, as disclosed by the record, are as follows: Three of the defendants, namely the Southern Pacific, Union Pacific and Oregon Short Line Railway Companies, jointly used the same depot at Ogden city, Utah, which was provided by the other defendant, the Ogden Union Railway Depot Company. They jointly used the same baggage room and were jointly furnished other depot facilities in general. There were five tracks provided by the depot company for passenger trains, which tracks were immediately in front of the depot buildings and were used by the railway companies mentioned in connection with the other depot facilities provided by the depot company. All of these tracks intersected and crossed Twenty-fourth street, on which plaintiff was traveling at the time he received the injuries complained of. Men known as "depot police" were employed by the depot company and were paid for their services by the Union Pacific Company. The duties of the depot police were to direct passengers what trains to take and to make re-

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ports of trains coming into, and going out from, this depot or station. The depot yards, railroad tracks, etc., were in charge of a yardmaster, who was employed by the Oregon Short Line Company and paid by the Union Pacific Company. The duties of the yardmaster were to designate which track or tracks the incoming trains of the different railway companies referred to should occupy and the different points at which they were to stop, and to direct the making up of passenger trains and designate points from which the outgoing trains should start. He had charge of the switching in the yards and directed what engine or engines were to be used on each particular occasion for that purpose. The flagmen were under him and subject to his orders. In fact, the evidence tends to show that he had general supervision over the depot grounds and represented each of the defendants in the operation of their trains within the depot yards. William L. Scott, who was yardmaster at the time of the accident, was called as a witness and testified in part as follows: "Q. Does the Oregon Short Line do all the switching for all the three companies? A. Yes, sir. Q. It is a joint yard of the three companies? A. Yes, sir. * * * Q. And in the switching do they [referring to the O. S. L. Company] use the engines of the other roads? A. Yes, sir; we have got S. P. engines, Short Line engines, and U. P. engines. * * * Q. Mr. Scott, isn't it true that all three of these companies are jointly handling their business in this yard regardless of one company or the other, and take whatever crew they can find, and the whole thing is a joint affair? A. It is a joint affair; yes, sir. Q. It is true that those three companies, for some purpose, jointly operate this yard down there? A. Yes, sir. Q. You are supposed to be working for the Short Line, not for the Southern Pacific? A. Yes; They are not kept separate. It is all in one yard. Everything done together. Q. Yes, everything done together there, and all three companies have one head? A. Yes, sir."

It is, in effect, conceded by counsel for appellants that business relations of some kind existed between the defendants respecting the control and management of their trains within the depot grounds. In their brief they say: "It may be supposed that there were business relations existing between these companies. * * * But what were these business relations?" Then they proceed to argue that, because plaintiff failed to prove just what these contractual relations were, he cannot recover, and that the court erred in denying the motions for a nonsuit. In support of this contention counsel cite and rely upon the case of the *Pennsylvania Railroad Co. v. Jones*, 155 U. S. 340, 15 Sup. Ct. 136, 39 L. Ed. 176. The action in that case was for personal injuries and was brought jointly against five railroad companies and judgment was entered jointly against four of them, namely, the Pennsylvania, the Baltimore & Potomac, Alexandria & Fredericksburg, and Alexandria & Washington Companies. On appeal to the Supreme Court of the United States the judgment was reversed as to the Pennsylvania Railroad Company, but

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affirmed as to the other defendants. By an examination of the opinion in that case it will be seen that the several railroads mentioned maintained a continuous line of track, different sections of which were owned by the several companies. The track where the accident occurred was owned by the Alexandria & Washington Company. In the course of the opinion the court says: "It is conceded, or sufficiently appears from the evidence, that the running and management of the road of the Alexandria & Washington Railroad Company were not within the scope of the ordinary powers of the Pennsylvania Railroad Company as a corporation of the state of Pennsylvania. To render the latter company responsible for what might take place on a railroad in another state some contract or arrangement to that effect must be made to appear. It is also disclosed by the evidence that neither of the trains by whose management the accident was caused was a train belonging to the Pennsylvania Railroad Company, and that the men in charge were not in the immediate employment of that company. * * * That the Pennsylvania Railroad Company advertised that it ran trains or connected with trains of other companies, so as to form through lines without breaking bulk or transferring passengers, did not tend to show any contract or agreement between the companies to share profits and losses." It must be conceded that the facts in that case, by which it was sought to connect the Pennsylvania Railroad Company with the accident and thereby hold it as a joint tort-feasor with the other companies mentioned, are not at all similar to the facts in this case. In that case no community of interest in the road where the accident occurred nor in the management or control of the trains which collided and caused the injuries to the plaintiff therein was shown to exist. Whereas, in the case under consideration, the undisputed evidence shows that the depot where plaintiff received his injuries was managed and controlled for the common use of the defendants. In fact, each of them in its answer, in referring to the railroad tracks where the accident occurred, admits "that it is and was at the times mentioned in the complaint * * * engaged in the business of maintaining and operating a railroad, together with engines and cars." This pleading cannot be construed other than as an admission that each of the defendants were "maintaining and operating a railroad together with tracks, engines, and cars" within the depot yards referred to. And we think there is abundant evidence in the record to support a finding by the jury that the depot was managed and controlled for the common benefit of all the defendants.

The train with which plaintiff collided was composed or made up of an engine owned by the Union Pacific Company attached to cars which belonged to the Southern Pacific Company, and was operated by a crew employed by the Oregon Short Line Company, and who were paid by the Union Pacific Company. It will thus be seen that there was a community of interest between the several defendants with respect to maintaining the tracks in the depot yards, and in the management of the trains

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of the different roads from the time they entered the depot until they departed therefrom, and especially was this so with respect to the handling and operating switch engines within the yards and the cars that were side-tracked and temporarily left at the station to be cleaned, or for other purposes. The facts in the case are, in some respects, similar to those in the case of the Pennsylvania Railroad Co. v. Jones, *supra*, on which the court upheld the joint judgment entered against three of the defendants therein. In that case it is said: "There was evidence from which the jury might properly infer that the railroad between the cities of Alexandria and Washington was managed and controlled for the common use of the Baltimore & Potomac Railroad Company, * * * the Alexandria & Washington Railroad Company, * * * and the Alexandria & Fredericksburg Railway Company; the gross earnings of these companies derived from this line between Alexandria and Washington, including what the Virginia Midland Railway Company paid for the privilege of running its trains over these tracks and what was received for transportation of mails, went into the hands of a common treasurer, and were by him, after payment of operating expenses, divided among the three companies according to some rule not very definitely shown, but apparently in proportion to the miles of track of each road; that the operating and accounting officers of the three companies were the same; that the freight train in question was, at the time of the collision, on that portion of the road which belonged to the Alexandria & Washington Railroad Company; that the engineer and fireman were employees of the Baltimore & Potomac Railroad Company; that the engine was that of the Alexandria & Fredericksburg Railway Company; and that the passenger train was in charge of a pilot employed and paid by the three companies. * * * Such a state of facts would, we think, warrant a finding of joint liability of these three companies to the plaintiffs." True, in the case at bar it was not shown what proportion of the expenses incurred in the maintenance of the depot yard, tracks, etc., or of the cost of the switching done therein, was paid by each of the respective companies. But plaintiff was not bound to do this in order to entitle him to recover against them jointly. It being conceded that there was sufficient evidence to support a finding of negligence on the part of those who were operating the engine and train with which plaintiff collided, all that was necessary for plaintiff to do, in order to make out a *prima facie* case of joint liability, was to introduce evidence from which the jury would be authorized in finding that the depot was maintained for the common use of the defendants, and that they all co-operated or were pecuniarily interested in putting in motion the agency that caused the injury. And, as hereinbefore stated, we think that there is abundant evidence in the record to support such a finding. 1 Shear. & Redf. Neg. 122; 15 Enc. Pl. & Pr. 557, and cases cited.

The judgment is affirmed, with costs.

STRAUP and FRICK, JJ., concur.

WEAVER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, Jan. 19, 1907. On Rehearing Feb. 5, 1907.)

[56 S. E. Rep. 657.]

Railroads—Accident at Crossing—Evidence.*—Where plaintiff sued to recover for damages caused by the moving of a train standing across a street while he was climbing between the cars, evidence that others passed over in the same way before plaintiff is admissible.

Trial—Instructions—Inferences from Evidence.—Requests intimating to the jury the inference to be drawn from the facts therein carefully set out in detail are properly refused.

Railroads—Accident at Crossing—Signals.—Though the lowering of gates across a street, where a railroad company is required to maintain them by ordinance, is notice that it is dangerous to cross, it does not excuse the railroad for failure to give the signals required by Civ. Code 1902, §§ 2132, 2139, at least 30 seconds before a train is moved.

Same—Contributory Negligence.—Failure to heed the warning given by gates closed at a crossing tends to show gross negligence.

Appeal from Common Pleas Circuit Court of Spartanburg County; Memminger, Judge.

Action by Bassett Weaver against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The following are defendant's exceptions:

"(1) In allowing plaintiff, under the circumstances of this case, to testify that other persons crossed over between the cars before he did. The error being, as it is respectfully submitted, that, inasmuch as the gates were down, it was irrelevant as well as incompetent to allow testimony as to what others did, and what influence it may have had upon plaintiff; the issue in this case being solely as to the negligence of the defendant and the contributory negligence of the plaintiff, and not as to the acts and conduct of other persons.

"(2) Because his honor erred in allowing the witnesses Widup and High to testify that they climbed over between these cars, and why they did it. The errors being that the issue in this case was as to the negligence of the defendant and the contributory negligence of the plaintiff, and not as to the acts and conduct of others; it being respectfully submitted that such evidence was both incompetent and irrelevant.

"(3) Because his honor erred in instructing the jury, as follows: 'And if you find that there was an ordinance of the city of Spartanburg which prohibited the railroad company from stopping its train on the street crossing for more than five min-

*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

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utes, and it being the general law that the railroad cannot stop upon the street crossing for an unreasonable time, and if you find that the Southern Railway did stop its train for an unreasonable time, for more than five minutes, that raises the general presumption of negligence, and the next question is: Did that negligence cause the injury alleged to have been suffered by this negro? And, if so, that is the basis of this action—if he has proved those allegations, he is entitled to damages.' The errors being, as it is respectfully submitted: (a) That this charge was a charge upon the facts, contrary to the provision of section 26, art. 5, of the Constitution, in that his honor instructed the jury that the blocking of the street for more than five minutes would be blocking it for an unreasonable time. (b) In that his honor by this charge instructed the jury that if this train did block the street for an unreasonable time, for more than five minutes, that this raised the general presumption of negligence, and that the plaintiff, if he proved such negligence, would be entitled to damage, thereby ignoring the precautions that the defendant may have taken to warn persons not to cross the railroad, and making the right of plaintiff to recover depend entirely upon the length of time the train was across the street. (c) That by this charge his honor instructed the jury that it was proven that the defendant did block the street for an unreasonable length of time, and that this negligence caused the injury, then the plaintiff was entitled to damage, thereby ignoring all questions as to the contributory negligence of the plaintiff, as well as all evidence of notice or warning given by the defendant before the train was moved.

"(4) Because his honor erred in charging the fourth request of the plaintiff, as follows: 'If a railroad company obstructs a highway for an unreasonable length of time, unless it is without fault, and a person enters upon its cars for the sole purpose of crossing the railroad track, he assumes only such risks as arise under the expectation that he has the right to entertain that the railroad will do what the law requires it to do—that is, ring the bell or blow the whistle for at least 30 seconds before the moving of the engine—and only such risks as may be attendant upon his own negligence; and whether he was guilty of gross or willful negligence, or of a violation of the law, is to be determined by the jury upon consideration of the facts and circumstances surrounding the case.' The error being that by this charge his honor ignored the provision of the statute which requires the plaintiff to prove, not only the failure of the defendant to comply with the statute, but that the plaintiff must make it appear that such failure contributed as a proximate cause to his injury, and led the jury to believe that, if the railroad company failed to ring its bell or sound its whistle, the plaintiff could recover simply by proving such fact without going further and proving that such failure contributed as a proximate cause to his injury.

"(5) Because his honor erred in refusing to charge the defendant's third request, as follows: '(3) If the danger of climb-

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ing over the cars which are standing across a street is obvious, known, and apparent to a person of ordinary care and prudence, and, notwithstanding this, a person undertakes to climb over such cars in the face of such obvious, known and apparent danger, he assumes the risk of so doing, and in this case if the jury find that it was dangerous for the plaintiff, taking into consideration his age and all the circumstances of the case, to climb between the cars which may have been standing across the street, and that the danger was such that a man of ordinary care and prudence ought to have seen and known it, then it was the duty of the plaintiff to see and know it, and if, under such circumstances, he carelessly and negligently did undertake to climb between such cars, then he assumed the risks incident to his so doing, and if the evidence shows that there was an engine hitched to such cars, with steam up, ready and likely to move at any moment, and if it should further appear that a person of ordinary care and prudence would have known that this engine was there, and that it was ready and likely to move at any moment, and that he ought to have known that it was dangerous to enter upon such cars, and, notwithstanding such facts, the plaintiff carelessly and negligently did undertake to climb upon and across the cars and was injured, then he cannot recover by simply proving that the train moved without ringing the bell or sounding the whistle, as the statute required.' The error being, as it is respectfully submitted: (a) That this request contained sound propositions of law, applicable to the facts of this case, and was not a charge upon the facts as his honor held. (b) That by this request the defendant desired the attention of the jury to be directed to the law governing the acts of a plaintiff in the face of an obvious, known, and apparent danger, and to the law governing the conduct of men of ordinary care and prudence, and that by his refusal his honor took from the jury such consideration, to the prejudice of the defendant.

"(6) Because his honor erred in refusing the defendant's fourth request, as follows: '(4) If there are cars standing across a street with an engine hitched to it, with steam up, ready, and likely to move at any moment, and if this is apparent and obvious to a man of ordinary prudence and foresight, then it is the duty of one who desires to cross such street to refrain from doing anything that would unnecessarily put himself in a place of danger, and where he was likely to be injured. And if it appears in this case that there were cars standing across the street with an engine hitched to it, with steam up, ready, and likely to move at a moment's notice, and if it should further appear that there was any sign, signal, or warning of such facts given to the public by the railroad company, in such manner that men of ordinary care and prudence ought to have seen and known it, then it was the duty of the plaintiff to have seen and known it, and if, notwithstanding these facts, if they do appear, the plaintiff undertook in the face of an obvious danger, and in the face of any signal, notice, or warning, to climb over and across such

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cars, under circumstances that made it dangerous to do so, and when a man of ordinary care and prudence would not have done it, and in consequence of this, as a proximate cause, he was injured, then he cannot recover any damages by simply proving that he himself did not know it was dangerous, or that the cars and engine moved without ringing the bell or sounding the whistle.' The error being, as it is respectfully submitted: (a) That this request contained sound propositions of law, applicable to the facts of this case, and was not a charge upon the facts, as his honor held. (b) That by this request the defendant desired the attention of the jury to be directed to the law governing the acts of a plaintiff in the face of an obvious, known, and apparent danger, and to the law governing the conduct of men of ordinary care and prudence, and that by his refusal his honor took from the jury such considerations, to the prejudice of the defendant. (c) That by this request the defendant desired the attention of the jury to be directed to the law governing the conduct of a man of ordinary care and prudence in the face of any sign, signal, or warning given by a railroad company that such place was dangerous, and that by such refusal his honor failed to submit such law to the jury, to the prejudice of the defendant.

"(7) His honor erred in refusing to charge the defendant's fifth request, as follows: '(5) If the jury find from the evidence that there were cars standing across the street, and that these cars were hitched to an engine with steam up, ready, and likely to move at any moment, and that there were gates operated by the railroad company at such street crossing, and should further find that these gates were put there under an ordinance of the city of Spartanburg for the purpose of preventing the public from using the crossing while cars were upon it, and for the further purpose of notifying the public that it was dangerous to so attempt to use the crossing while the same was being used by the railroad company, and while cars were about to be moved over or on such crossing, and should further find that at the particular time mentioned in the complaint these gates were down, and that the railroad company was complying in this respect with the ordinance of the city of Spartanburg, and that this was sufficient to warn and notify persons of ordinary care and prudence not to enter upon the cars or crossing, and that it was dangerous for any one to enter upon such crossing, or attempt to climb over or upon the cars, and should further find that notwithstanding these facts, if such facts do exist, that the plaintiff, carelessly and negligently, did undertake to climb between the cars, at a time and under circumstances when he ought to have known it to be dangerous, and in consequence thereof was injured, and if the jury should find that such facts, if they exist, were grossly careless and negligent, and that they contributed as a proximate cause to the injury, then the verdict should be for defendant.' The error being, as it is respectfully submitted: (a) That this request contained sound propositions of law, applicable

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to the facts of this case, and was not a charge upon the facts, as his honor held. (b) That by this request the defendant desired the attention of the jury to be directed to the law governing the acts of a plaintiff in the face of an obvious, known, and apparent danger, and to the law governing the conduct of men of ordinary care and prudence, and that by his refusal his honor took from the jury such considerations, to the prejudice of the defendant. (c) That by this request the defendant desired the attention of the jury to be directed to the law governing the conduct of a man of ordinary care and prudence in the face of any sign, signal, or warning given by a railroad company that such place was dangerous, and that by such refusal his honor failed to submit such law to the jury, to the prejudice of the defendant. (d) That by this request the defendant desired the court to instruct the jury as to the law governing the conduct of a person of ordinary care and prudence where gates were operated by a railroad company, especially in so far as it affected the question of the contributory negligence of the plaintiff in this case, and that by his refusal his honor took such questions from the consideration of the jury, to the prejudice of the defendant.

“(8) Because his honor erred in modifying and in not charging defendant’s seventh request, to wit: ‘(7) The moving of cars by a railroad company from across a street or highway is a lawful act, and if for any reason a street has become obstructed, even for an unreasonable length of time, by the cars being placed upon them, the moving of such cars by the company from across the street is of itself a lawful act, and if it takes precautions which are sufficient to notify and warn persons of ordinary care and prudence that such cars are about to be moved, and that it is dangerous to enter thereon, it is the duty of persons intending to use the crossing to heed such warning. And in this case, even if it does appear that the street where the injury occurred was blocked by the cars of the defendant which were at a standstill, yet if it further appears that there was notice sufficient to warn persons of ordinary care that the cars were likely to move at any moment, and that it was dangerous for any one to attempt to climb over, then it was the duty of the plaintiff to heed the same, and if he failed to do so, and did an act—which he ought to have known to be a dangerous, grossly careless, and negligent one—and was injured thereby, then he cannot recover from the defendant in this case by simply showing that the cars were moved without the ringing of the bell or sounding of the whistle.’ The error being, as it is respectfully submitted: (a) That this request contained sound propositions of law, applicable to the facts of this case, and was not a charge upon the facts, as his honor held. (b) That by this request the defendant desired the attention of the jury to be directed to the law governing the acts of a plaintiff in the face of an obvious, known, and apparent danger, and to the law governing the conduct of men of ordinary care and prudence, and that by his refusal his honor took from the jury such considerations,

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to the prejudice of the defendant. (c) That by this request the defendant desired the attention of the jury to be directed to the law governing the conduct of a man of ordinary care and prudence in the face of any sign, signal, or warning given by a railroad company that such place was dangerous, and that by such refusal his honor failed to submit such law to the jury, to the prejudice of the defendant. (d) That by this request the defendant desired the court to instruct the jury as to the law governing the conduct of a person of ordinary care and prudence where gates were operated by a railroad company, especially in so far as it affected the question of the contributory negligence of the plaintiff in this case, and that by his refusal his honor took such questions from the consideration of the jury, to the prejudice of the defendant.

“(9) Because his honor erred in modifying and in not charging defendant’s ninth request, as follows, to wit: ‘(9) A railroad company has a right in the transaction of its business to block a street with its cars for a reasonable length of time, and in this case, if the street was blocked by the cars of the defendant for not more than five minutes, this, of itself, did not give any one the right to climb over and upon the cars of the defendant without its permission or consent, and if the plaintiff did undertake, while the cars of the defendant were across the street, to climb over them without its consent, he thereby became a trespasser, and cannot recover for any injuries received by him while upon such cars, unless he proves that such injuries were willfully, wantonly, or intentionally inflicted upon him.’ The error being, as it is respectfully submitted: (a) That this request contained sound propositions of law, applicable to the facts of this case, and was not a charge upon the facts, as his honor held.

“(10) Because his honor erred in not charging defendant’s tenth request, as follows: ‘(10) If the evidence shows that the train on which it is alleged the plaintiff was injured did not stop across the street for an unreasonable length of time, and should further show that the railroad company had gates there for the purpose of warning or notifying the public not to cross when there was danger in doing so, and that on this occasion the gates were down, then, under such circumstances, if they exist, neither the plaintiff nor any one else had any right to enter on such cars, and, if they did so, they became trespassers, and cannot recover any damages for injuries received while on the cars, unless such injuries were willfully or wantonly inflicted, or were inflicted by the negligence of the defendant after he became aware of plaintiff’s danger.’ The error being, as it is respectfully submitted: (a) That this request contained sound propositions of law, applicable to the facts of this case, and was not a charge upon the facts, as his honor held. (b) That by this request the defendant desired the attention of the jury to be directed to the law governing the acts of a plaintiff in the face of an obvious, known, and apparent danger, and to the law governing the conduct of

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men of ordinary care and prudence, and that by his refusal his honor took from the jury such considerations to the prejudice of the defendant. (c) That by this request the defendant desired the attention of the jury to be directed to the law governing the conduct of a man of ordinary care and prudence in the face of any sign, signal, or warning given by a railroad company that such place was dangerous, and that by such refusal his honor failed to submit such law to the jury, to the prejudice of the defendant. (d) That by this request the defendant desired the court to instruct the jury as to the law governing the conduct of a person of ordinary care and prudence where gates were operated by a railroad company, especially in so far as it affected the question of the contributory negligence of the plaintiff in this case, and that by his refusal his honor took such questions from the consideration of the jury, to the prejudice of the defendant. (e) That by this request the defendant desired the jury to be instructed as to the rule of law governing a person who desired to cross a street where gates were down, and as to the relationship of such person to the railroad company where it appeared that the street was not blocked for an unreasonable length of time, and that by such refusal his honor prevented the jury from considering such questions, to the prejudice of the defendant.

“(11) Because his honor, after reading sections 2132 and 2139, vol. 1, of the Civil Code of 1902, erred in instructing the jury, as follows: ‘And the law under the statute is this: That if a man is injured by negligence of the railroad company, and he himself is guilty of contributory negligence, at any other place than a crossing, he is not entitled to recover, if he is guilty himself of want of ordinary care, if he is guilty of what is known as contributory negligence generally, or want of ordinary care himself as a proximate cause; but where the injury occurs at a crossing, and the railroad company is proved to have violated those requirements of law which require them to give certain signals at a crossing, then, even though that man be guilty of ordinary contributory negligence—that is, the lack of ordinary care and diligence—he can recover, because the law says he can recover at a crossing unless he himself is guilty of gross or willful negligence, or was acting in violation of law, and such negligence was willful or unwillful and contributed to the injury. So you see that is the distinction here invoked, and that is the distinction between an injury at a crossing and an injury at a place other than a crossing in this state.’ The errors being, as it is respectfully submitted: (a) That by this charge his honor failed to instruct the jury that it was incumbent upon the plaintiff to prove not only that there was a failure to give the signals required by the statute, but that it must appear that such failure contributed to the injury, before the question of the gross or willful negligence of the plaintiff could be considered by the jury, and leading the jury to believe that the defense of want of ordinary care on the part of the plaintiff was not a good defense,

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even though the evidence was not sufficient to make it appear that the failure to give the signals contributed to the injury. (b) That by this charge his honor instructed the jury that, if there was a failure to give the signals required by the statute, the plaintiff could recover, even though it did not appear that such failure contributed as a proximate cause to the jury, unless he was guilty of gross or willful negligence, or was doing an act in violation of law."

Sanders & De Pass, for appellant.

Nichols & Jones and *Stanyarne Wilson*, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff, while climbing between two freight cars across a street, in the city of Spartanburg. The facts are thus set out in the complaint: "That on the 20th day of June, 1903, the defendant negligently and unlawfully allowed one of its trains to stop for an unreasonable time, 15 or 20 minutes, across Magnolia street, one of the principal streets of the city of Spartanburg, to the great inconvenience and annoyance of those using the street, including this plaintiff, in violation of his right to said street, and in violation of the ordinance of said city which prohibited the blocking of said public crossing for a longer period than five minutes. That on said day plaintiff was going along said street, and, coming to said crossing, found it blocked, as aforesaid, by defendant's train. That, after waiting a considerable time, the train not moving, and plaintiff being anxious to get out of the rain, also being very unwell, he had to go over said crossing and along said street, by going between two of the cars of said train over the bumpers, which were standing motionless as aforesaid. That while in such act, without any notice or warning, without sounding a whistle or ringing a bell, disregarding the statute law of this state, the defendant company, through its agents and servants, in charge of said train, negligently, unlawfully, recklessly, wantonly, and in utter disregard of plaintiff, caused said train of cars to suddenly and quickly start and move, thereby throwing him down upon its railroad track, running its wheels over his foot, crushing and mangleing it, and cutting it off, to his great suffering and injury, and to his damage in the sum of \$2,000." The defendant denied all the allegations of the complaint, except the corporate existence of the defendant, and the injury of the plaintiff while climbing between the cars, and alleged that: "On the occasion named it was carrying on its business in a lawful way in its yard in the city of Spartanburg, and that while so doing, and after the gates were down—which said gates, under the ordinances of the city of Spartanburg, it was required to keep, maintain, and operate across its streets when trains were on said streets—the plaintiff herein, after he knew, or ought to have known, that said gates were down, carelessly and negligently attempted to pass between two of the defendant's cars, to which an engine was hitched, and after he knew that it was likely that said cars would be moved

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at any moment, and while so doing, in a careless and negligent manner, was injured by the movement of said train in a lawful manner, and that the injury which was received by plaintiff on the said occasion was caused by his own carelessness and negligence in attempting to pass between the two said cars, after he knew, or could have known by the exercise of ordinary and due care and caution, that said train would likely move at any moment, and after due warning had been given that the train, which was then on and across said streets, was there only temporarily, and that it was the intention that the same should be moved at any moment, and that the carelessness and negligence of the plaintiff in so attempting to pass between the said cars, which he knew, or ought to have known, was a dangerous act, caused and contributed to the injury aforesaid." The jury rendered a verdict in favor of the plaintiff for \$500, whereupon the defendant appealed upon exceptions which will be incorporate in the report of the case.

1. The first question that will be considered is whether his honor, the presiding judge, erred in ruling that the plaintiff could introduce evidence to the effect that other persons climbed between the cars, and why they did so. The appellant's attorneys realize the fact that the case of *Thomasson v. Railway*, 72 S. C. 1, 17 R. R. R. 226, 46 Am. & Eng. R. Cas., N. S., 226, 51 S. E. 443, sustains said ruling, but asked permission, which was granted, to review that case. After careful consideration, the court adheres to its former ruling.

2. The next question for consideration is whether the presiding judge erred in refusing certain requests mentioned in the exceptions on the ground that they were a charge upon the facts. The rule when facts should be submitted to the jury is thus clearly stated, in 16 A. & E. Enc. of Law, 465, et seq., and quoted with approval in *Rinake v. Victor Mfg. Co.*, 66 S. C. 482, 45 S. E. 81, to wit: "The general rule is well known that questions of fact are to be submitted to the jury, and this includes not only cases when the facts are in dispute, but also when the question is as to inference to be drawn from such facts after they have been determined. It will readily be observed that few cases will arise in which there is no question as to the facts involved. The element of ordinary care must from its very character always require the decision of a jury, except where there is a violation of statutory duty, or when the facts are undisputed, and but one inference can be reasonably drawn from them. And the same is equally true as to the determination of the question of proximate cause, so that the following rules may be stated as applicable to every case: The issue of negligence should go to a jury (1) when the facts, which, if true, would constitute evidence of negligence, are controverted; (2) when such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn; (3) when the facts are in dispute, and the inferences to be drawn therefrom are doubtful." In *Lampley v. Railroad*, 71 S. C. 156, 50 S. E. 773, the

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court says: "Negligence is a mixed question of law and fact. It is the duty of the court to define negligence, but the jury must draw the inference from the facts in each case." The presiding judge could not have charged the said requests without intimating to the jury the inference to be drawn from the facts therein so carefully set out in detail. The instructions would have been in violation of article 5, § 26, of the Constitution, and were therefore properly refused.

We proceed next to consider whether there was error on the part of the presiding judge in construing sections 2132 and 2139 of the Civil Code of 1902, which are as follows:

"Sec. 2132. A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place; and if such engine or cars shall be at a standstill within a less distance than one hundred rods of such crossing such bell shall be rung, or such whistle sounded, for at least thirty seconds before such engine shall be moved; and shall be kept ringing or sounding until such engine shall have crossed such public highway or street or traveled place."

"Sec. 2139. If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such conduct contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury."

The first assignment of error is that the presiding judge ignored the provision of the statute which requires the plaintiff to prove, not only the failure of the defendant to comply with the statute, but that such failure contributed to the injury as a proximate cause. At the time the circuit judge used the language set out in the exceptions, he was not specially discussing this feature of the statute, but the effect of a lack of ordinary care and gross negligence on the part of a person injured at a crossing. He, however, charged the defendant's first request, which was as follows: "Proof of the mere failure to ring the bell or sound the whistle, as required by the statute, before moving cars which may be across a street, is not of itself sufficient to warrant a recovery for an injury received by one while attempting to climb over or between two of such cars; but, in order to warrant such recovery, the evidence should go further, and

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show that this failure to give the signals required by the statute contributed as a proximate cause to the injury complained of, and if the evidence does not show not only that the signals were not given, but that the failure to give them did contribute as a proximate cause to the injury, then there can be no recovery, and the verdict should be for the defendant."

3. The last question for determination is whether the circuit judge erred in charging that, if the defendant failed to comply with the foregoing statutory requirement, the plaintiff was entitled to recover, unless it was shown that he was guilty of gross or willful negligence, or was acting in violation of such law, and that such negligence or violation of law contributed to the injury. The appellant, in effect, contends that the lowering of the gates gave warning of the dangerous condition of the track and dispensed with the necessity to comply with the statutory requirements as to ringing the bell or sounding the whistle, at least 30 seconds before the engine was moved when it was at a standstill, within a less distance than 100 rods of the crossing; and that the plaintiff under such circumstances cannot recover if he failed to exercise ordinary care, and such failure contributed to the injury. There are cases in which the law will dispense with the necessity for compliance with the statutory signals at a crossing, and then it is not necessary for the railroad company to show that the party injured was guilty of gross negligence or was acting in violation of the law, as, for instance, when a person sees the train approaching a crossing in ample time to avoid the danger of a collision. The reason is because he possesses all the information which the ringing of the bell or the sounding of the whistle was intended to give. The vital question in this case, therefore, is whether the lowering of the gates afforded the plaintiff the information which the ringing of the bell or the sounding of the whistle for 30 seconds before the train moved would have given him. The lowering of the gates was a general warning of danger at that time in attempting to cross the track, but it did not give any specific information as to the time when the train would move; while, on the other hand, the statute was intended to inform those about to use the crossing of the specific fact that the train would not move within 30 seconds. A person who sees a train across a highway knows that it is dangerous to attempt to cross the track at that time, and, while the lowering of the gates accentuated this fact, it does not give any particular information. Therefore the notice arising from the lowering of the gates did not afford protection equal to that intended by the statute, and does not supersede the necessity for complying with its requirements. Although the erection of the gates did not supersede the necessity of complying with the requirements of the statute, nevertheless, when the warning which they give is ignored, it strongly tends to show gross negligence on the part of the person injured.

These views practically dispose of all the questions presented by the exceptions.

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It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court is satisfied that no material question of law or fact has been overlooked or disregarded.

It is therefore ordered that the petition be dismissed, and the order herein granted staying the remittitur be revoked.

BAKER v. NORFOLK & S. R. Co.

(Supreme Court of North Carolina, Feb. 26, 1907.)

[56 S. E. Rep. 553.]

Railroads—Crossing Accidents—Evidence—Admissibility.—In an action for injuries sustained by plaintiff in a collision at a crossing between the vehicle in which he was riding and defendant's train, the fireman testified that the horse was standing at the crossing when last seen by him, before the engine was reversed, and a witness testified that he heard a conversation between plaintiff and G. a few minutes after the accident, in which the former stated that the driver of the wagon said that he intended to drive to the crossing and stop there to "gentle" his horse and thereafter defendant offered to prove by G. what plaintiff had said to him as to why the horse was driven up close to the track. Held, that it was error to exclude such testimony.

Same—Questions for Jury.—In an action against a railroad for injuries sustained by plaintiff in a collision at a crossing between the vehicle in which he was riding and defendant's train held a question for the jury whether the horse and vehicle were on the crossing, and the dangerous situation of plaintiff was or could have been discovered by the engineer when the engine first came in view, so as to have been stopped in time to prevent the collision, or whether when first seen by the engineer, the horse was standing near the crossing apparently under the control of the driver, and continued in that position until it was too late for the train to be stopped.

Same—Instructions.—The court refused an instruction requested by defendant, to the effect that if the engineer applied the brakes when he first saw the horse approach the crossing, and then released them when the horse stopped near the crossing apparently under control, and did not start to cross the track until it was too late to prevent the collision, and the engineer did all that could be done to prevent a collision, defendant was not guilty of any negligence. An issue as to contributory negligence was submitted, and the jury found that there was no such negligence, and the court charged generally that if the engineer failed to exercise ordinary care after he saw the position of the horse, and it caused the collision, the jury

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should answer the first issue in the affirmative on an issue as to "last clear chance" the court substantially gave the instruction refused, but, as there was no contributory negligence, there was no finding on the issue as to "last clear chance." Held, that the refusal of the requested instruction on the first issue was reversible error.

Negligence—Imputed Negligence—Driver of Private Vehicle.*—

The negligence of a minor driver of a vehicle belonging to his father in approaching a railroad crossing cannot be imputed to one riding with him, as his guest.

Appeal from Superior Court, Pasquotank County; McNeil, Judge.

Action by Charles Q. Baker against the Norfolk & Southern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

This action was brought to recover damages for injuries received at a railroad crossing, which plaintiff alleges were caused by the negligence of the defendant in the management of one of its trains. The plaintiff and Bud Mann were riding in a buggy with Cecil Williams, who was driving. The horse and buggy belonged to Cecil's father. The three occupants of the buggy were all boys about 15 years old. They drove over the crossing to a cotton mill in Elizabeth City to collect their wages, and finding that they could not get their money at that time, they drove back, intending to hitch the horse to a tree on the other side of the track, and when they had reached the crossing the horse became frightened at the whistle of the engine, which was blown about that time, and backed on or very near the track, so that he could not be driven across. When the train came in full view of the crossing it was about one quarter of a mile away, and the dangerous position of the plaintiff and his companion could easily have been seen by the engineer. The engine struck the buggy and killed Cecil Williams and Bud Mann and severely injured the plaintiff. This was plaintiff's version of the facts. The defendant alleged that when the boys got in the buggy at the mill, Cecil Williams said that he intended to drive to the crossing and stop so as "gentle" his horse, and that he did drive to the crossing and stop his horse very near the track; that the horse was standing there apparently under control of the driver when it was first seen by the engineer, and that when the train had approached too near the crossing to be stopped before reaching it, the horse became unruly, and got upon the crossing; that immediately the fireman notified the engineer, and he reversed the engine, and did all that could be done to stop the train, but

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Kane v. Boston Elev. Ry. Co.* (Mass.), 20 R. R. R. 581, 43 Am. & Eng. R. Cas., N. S., 581; *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Jacksonville Electric Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

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failed to do so as it was too near the crossing, when the danger was first discovered, to be stopped in time to avoid a collision with the buggy. There was evidence to sustain each of these contentions. The defendant had introduced a witness, M. H. Snowden, who testified that he heard a conversation between the plaintiff and F. L. Garrett a few months after the accident, in which the former stated that Cecil Williams said when they left the mill that he would drive to the crossing, and stop there to "gentle" his horse, and that he did drive there and stop. The fireman testified that the horse was standing at the crossing when last seen by him before the engine was reversed. The defendant proposed to prove by F. L. Garrett what the plaintiff had said to him in that conversation as to "why the horse was driven up close to the track." This testimony was offered in order to show that the horse had stopped on reaching the crossing, and to corroborate the fireman, who testified that the horse was standing there when last seen by him before the engine was reversed. This evidence was excluded by the court. There was testimony to the effect that the engineer applied the brakes as soon as he saw the horse and buggy approaching the crossing, and, when the horse stopped near the crossing, and appeared to be under control, he released the brakes, and the train continued at its former speed; that is, 50 miles an hour, until the engineer was notified by the fireman of the danger, and reversed the engine. He could not see the horse and buggy when he was told by the fireman of the danger, as the boiler of the engine obstructed his view; he being on the right-hand side of the cab. The defendant requested the court to charge the jury that if the engineer applied the brakes when he first saw the horse and buggy approach the crossing, and then released them when the horse stopped and stood near the crossing, apparently under the control of the driver, and the horse did not start to cross the track until it was too late to stop the train and prevent the collision, and the engineer then did all that could be done to stop the train, the defendant was not guilty of any negligence, and they should so find. The court did charge, at the defendant's request, that "if the horse was stopped before he reached the track and appeared to be under control, defendant was not required to stop the engine or slacken the speed, because of the presence of the buggy and horse, and was not guilty of negligence in failing to do so on that account; and the jury shall so find." Issues as to negligence, contributory negligence, the last clear chance and damages, were submitted to the jury. The substance of the instruction which was requested by the defendant upon the first issue, as to the defendant's negligence, and refused by the court, as to that issue, was given upon the third issue, as to the last clear chance. The court charged generally that if the engineer failed to exercise ordinary care in approaching the crossing after he saw the position of the horse and buggy, and this caused the collision, the jury should answer the first issue "Yes," otherwise they should answer it

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"No." The jury, answering the first issue, found that the plaintiff was injured by the negligence of the defendant, and in answer to the second issue, that there was no contributory negligence. They assessed the damages, but did not answer the third issue. Defendant's motion for a new trial was overruled, and judgment entered for the plaintiff, from which the defendant appealed.

Pruden & Pruden and Shepherd & Shepherd, for appellant.
Aydlett & Ehringhause, and *J. B. Leigh*, for appellee.

WALKER, J. (after stating the case). The defendant asked the witness Garrett, what was said by the plaintiff, in the conversation with him, as to why the horse was driven close to the track? If the defendant's counsel had not indicated what they expected to elicit from the witness by this question, the ruling of the court excluding it might, perhaps, be sustained upon the principle that the competency and materiality of proposed testimony, which is ruled out must appear before we can see that any error has been committed by the court. *Knight v. Killebrew*, 86 N. C. 400; *Summer v. Candler*, 92 N. C. 634; *State v. McNair*, 93 N. C. 628; *State v. Skidmore*, 109 N. C. 795, 14 S. E. 63; *State v. Dula*, 61 N. C. 437. But here the defendant's counsel stated, as the record afterwards shows, that the question was asked for the purpose of showing that the horse and buggy were stopped at the crossing, as contended by the defendant, and testified by the fireman; it appearing by the previous testimony of the witness Snowden, who heard the conversation between the plaintiff and Garrett, that the former had so stated in that conversation. Even if the evidence was merely cumulative to that of Snowden, it was, nevertheless, competent and relevant; and, being that of the witness who himself had the conversation with the plaintiff, it was perhaps entitled to greater weight, and would receive more consideration, from the jury than that of Snowden. The prior testimony of Snowden clearly shows its relevancy, even if the statement of counsel as to what they expected to prove was not in itself sufficient for that purpose. The offer of proof included, not only the declaration of Cecil Williams, in via, as to where he was going, which was part of the *res gestæ* (*State v. Dula, supra*), but the further fact that he actually stopped at the crossing. We were not told why the evidence was excluded. It was not hearsay, and, being otherwise competent and material, because it tended to sustain the defendant's theory as to how the injury was caused, it should have been admitted.

The general charge of the court in respect to the degree of care required of the defendant's servant in approaching the crossing with the train, would perhaps have been fully sufficient in the absence of any request for more specific instructions. *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032; *State v. Jackson*, 112 N. C. 851, 17 S. E. 149; *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368; *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610;

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Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782. It is also true that the court is not obliged to adopt the very words of an instruction asked to be given provided in responding to the prayer it does not change the sense or so qualify the instruction as to weaken its force. *Brink v. Black*, 77 N. C. 59; *Chaffin v. Mfg. Co.*, 135 N. C. 95, 47 S. E. 226. These are rules which are observed in all appellate courts. But it is an equally well-established rule that, if a request is made for a specific instruction, which is correct in itself, and supported by evidence, the court, while not required to adopt the precise language of the prayer, must give the instruction, at least in substance, and a mere general and abstract charge, as to the law of the case, will not be considered a sufficient compliance with this rule of law. We have held repeatedly that if there is a general charge upon the law of the case, it cannot be assigned here as error that the court did not instruct the jury as to some particular phase of the case unless it was specially requested so to do. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. It would seem to follow from this rule, and to be inconsistent with it if we should not so hold, that if a special instruction is asked as to a particular aspect of the case presented by the evidence, it should be given by the court with substantial conformity to the prayer. We have so distinctly held recently in the case of *Horne v. Power Co.*, 141 N. C., at page 58, 53 S. E. 661, in which Justice Connor, speaking for the court, and quoting with approval from *State v. Dunlop*, 65 N. C. 288, says: "Where instructions are asked upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence."

Whether the horse and buggy were on the crossing and the dangerous situation of the plaintiff and his companions was observed, or could have been discovered, by the engineer when the engine first came in view, so as to have been stopped in time to prevent the collision; or whether when first seen by the engineer the horse was standing near the crossing, apparently under the control of its driver, and continued in that position until it was too late for the train to be stopped before reaching the crossing (*Markham v. Railroad*, 119 N. C. 715, 25 S. E. 786), were the two alternative phases presented by the evidence, and the defendant had the right by a special instruction to require the court to direct the attention of the jury to the theory upon which it relied, provided it was supported by evidence, and we think it was. The court should, in response to the prayer, have instructed the jury specially as to the law arising upon the recited facts, if they should find them to exist, and in refusing to do there was error. *Savage v. Davis*, 131 N. C. 159, 42 S. E. 571. The fact that the

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court gave the instruction on the third issue did not cure the error in refusing it on the first, as the jury did not answer the third issue at all, having found that there was no contributory negligence. The instruction on the third issue, therefore, was of no avail to the defendant, and its liability was left to depend solely upon the response to the first issue, without any definite instruction as to proximate cause or the last clear chance having reference to the special facts of the case.

It is unnecessary to consider the remaining questions as they may not again be presented. It may be said, though, upon the issue as to contributory negligence, that if the act of Cecil Williams in driving to a point near the crossing for the purpose of "gentling" his horse, was negligence on his part, it cannot be imputed to the plaintiff, who was merely riding with him in the buggy as his guest, and unless the plaintiff was otherwise negligent, the finding of the jury on the second issue was correct. The doctrine of imputed negligence is so ably and exhaustively discussed by Justice Douglas, in *Duval v. Railroad*, 134 N. C. 331, 46 S. E. 750, 65 L. R. A. 722, 101 Am. St. Rep. 830, a case much like this one, that we are satisfied simply to refer to that case without further comment.

There must be another trial, because of the errors above pointed out.

New trial.

ARKANSAS & L. RY. CO. v. SANDERS.

(Supreme Court of Arkansas, Feb. 11, 1907.)

[99 S. W. Rep. 1109.]

Railroads—Injuries to Animals on or Near Tracks—Actions—Presumptions and Burden of Proof.*—In an action against a railway company for the negligent killing of a horse, proof of the killing of the animal made a prima facie case of negligence against the company.

Same—Negligence—Question for Jury.—In an action against a railway company for the negligent killing of a horse, the question of negligence on the part of the company was one of fact for the jury.

Same—Instructions.—In an action for the negligent killing of a horse by the servants of a railway company, an instruction was erroneous which made the question of negligence or due care depend upon whether or not the engineer and fireman "in good faith exercised the best judgment they could under the circumstances."

*For the authorities in this series on the subject of presumption of negligence and burden of proof in actions against railroads for running their trains over stock, see foot-notes appended to *Mobile & O. R. Co. v. Morrow* (Ky.), 21 R. R. R. 644, 44 Am. & Eng. R. Cas., N. S., 644; foot-notes appended to *Kansas City S. Ry. Co. v. Cash* (Ark.), 21 R. R. R. 624, 44 Am. & Eng. R. Cas., N. S., 624.

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Evidence—Opinion Evidence—Distance.—In an action for the negligent killing of a horse by the servants of a railway company, it was not error to allow witnesses to testify, from having the plaintiff point out the place where the animal was killed, as to the distance the engineer could have seen the horse.

Railroads—Injuries to Animals on or Near Tracks—Action—Instructions.†—Where plaintiff's horse was struck by defendant's train and killed, it was proper to instruct that it was the duty of the defendant's servants to keep a lookout.

Same—Sufficiency of Evidence.—In an action for the negligent killing of a horse by defendant's train, evidence held to sustain the finding that no lookout was kept by defendant's servants.

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Action by R. J. Sanders against the Arkansas & Louisiana Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Rogers and B. S. Johnson, for appellant.

W. P. Feazel and Sain & Sain, for appellee.

MCCULLOCH, J. This is an action against the railway company by the owner of a horse to recover damages for its alleged negligent killing by servants of the company in the operation of a train, and it is the second appearance here of the case. 69 Ark. 619, 65 S. W. 428. The facts are stated in the former opinion. The second trial resulted in a verdict in favor of the plaintiff for the value of the horse and the defendant again appealed. It is contended that the evidence does not sustain the verdict.

Proof of the killing of the animal made a prima facie case of negligence against the company and cast upon it the burden of proving that its servants were not guilty of negligence. It was admitted by the engineer that no alarm was given either by ringing the bell or sounding the whistle. He stated, however, that in his judgment the chances of avoiding the injury were, under the circumstances, better by omitting these alarms. This left a question for the jury to determine whether he exercised ordinary care to avoid injuring the animal. The jury were not bound to accept his opinion as to the best means of avoiding the injury. They had the right to exercise their own judgment in determining that question, as it was not a question calling for special knowledge or experience on the subject. The evidence shows that the horse was running toward the track in front of the approaching engine, and it is very probable that an unusual alarm such as a blast of the whistle would have frightened the animal and diverted its course from the direction of the danger. *Fordyce v. Edwards*, 65 Ark. 98, 44 S. W. 1034.

†See foot-notes appended to *Kansas City Southern Ry. Co. v. Ingram* (Ark.), 21 R. R. R. 570, 44 Am. & Eng. R. Cas., N. S., 570.

Arkansas & L. Ry. Co. v. Sanders

Appellant complains of the court's refusal to give the following instruction: "No 9. If the jury find from the evidence that the engineer and fireman did all they reasonably could have done to avert an injury to the animal in controversy, and in good faith exercised the best judgment they could under the circumstances and in the time they had to consider, they will find for the defendant, though they further find that had they acted otherwise the accident would not or might not have happened." The instruction was properly refused. It made the question of negligence or due care depend upon whether or not the engineer and fireman "in good faith exercised the best judgment they could under the circumstances." This is not the correct test of negligence, which is the omission to do something which a reasonably prudent and careful person would, or the doing something which such a person would not, do, under like circumstances. 1 Thompson on Negligence, §§ 1, 2; Hot Springs R. Co. v. Newman, 36 Ark. 607. The engineer and fireman may have, in perfect good faith, done what they honestly believed to be the best in order to avoid the injury, and yet have been guilty of negligence.

No error was committed by the court in permitting witnesses to testify, from having the plaintiff point out the place where the animal was killed, as to the distance the engineer and fireman could have seen it after the engine passed out of the cut. Their testimony was, of course, founded upon the truth of plaintiff's statement pointing out the place to them and the jury considered this in testing the weight of their testimony. It was not hearsay because the plaintiff testified that he went with them and assisted in measuring the distance.

Nor was there any error in instructing the jury upon the duty of defendant's servants to keep a lookout. There was evidence to base the instruction upon, as the engineer testified that he saw the horse only 70 or 100 yards in front of the engine, and the testimony of the other witnesses tended to show that the horse could have been seen about 150 yards. If it could have been seen that distance, and the engineer did not see it until he got within a distance of 100 yards, the jury were warranted in finding that no lookout was kept.

Judgment affirmed.

JONESBORO, LAKE CITY & E. R. CO. *v.* GUEST.

(Supreme Court of Arkansas, Jan. 7, 1907.)

[99 S. W. Rep. 71.]

Railroads—Injuries to Animals on Track—Action—Evidence—Sufficiency.*—In an action against a railroad for the killing of horse on the track, evidence held sufficient to sustain a finding that, if the headlight had been in good condition, the engineer could have seen the horses in time to have avoided the accident, if he had been keeping a lookout.

Same—Care Required—Animals Seen on Track.—A railroad company was liable for the killing of horses on the track, where, if the headlight had been in good condition, the engineer could have seen the horses in time to have avoided killing them, if he had been keeping a lookout.

Appeal from Circuit Court, Craighead County; Allen Hughes, Judge.

Action by J. W. Guest against the Jonesboro, Lake City & Eastern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. F. Brown, for appellant.

Lamb & Caraway, for appellee.

BATTLE, J. J. W. Guest sued the Jonesboro, Lake City & Eastern Railroad Company for killing two horses of the value of \$300, and his property, and recovered a verdict and judgment for \$300. The question is: Was the verdict sustained by the evidence?

The horses were of the value of \$300, the property of the plaintiff, and were killed by the defendant's train on the track of its railroad. There was evidence adduced tending to prove the following facts:

First. The defendant was running its train with a headlight so dim that nothing could be seen more than 50 yards in advance of the train.

Second. The horses ran from 100 to 125 yards ahead of the train and between the rails before going into the trestle where the horses were killed.

Third. Between a curve over which the train passed before killing the horses and the trestle is a quarter of a mile of straight track.

Fourth. That there was every opportunity for the engineer to have seen the horses, if his headlight had been in a condition to enable him to see, for a quarter of a mile before he struck them.

Fifth. That the train was stopped "in about its length."

*For the authorities in this series on the subject of the duty of trainmen to lookout for stock, see preceding case, and foot-notes.

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From this evidence the jury might reasonably have concluded that, if the headlight had been in good condition, the engineer could have seen the horses in time to avoid killing them, if he had been keeping a lookout. The evidence was sufficient to sustain the verdict.

Judgment affirmed.

ATCHISON, T. & S. F. RY. CO. v. ADCOCK.

(Supreme Court of Colorado, Dec. 3, 1906.)

[88 Pa. Rep. 180.]

Trial—Questions for Jury—Issues of Fact—Railroads—Action for Damages—Killing Animals—Conversion.—In an action against a railroad company for damages for killing plaintiff's cattle, there was evidence tending to prove that defendant converted the bodies of the animals to its own use. Held, that a motion for nonsuit at the close of plaintiff's testimony was properly overruled, for even if defendant was not liable for the killing, the case should have been submitted to the jury on the question of conversion.

Railroads—Killing Animals—Negligence—Instructions.—In an action against a railroad company for killing cattle, evidence as to the killing without any evidence of negligence will not authorize an instruction that if the jury find that defendant negligently killed the cattle it was liable, and the refusal of an instruction that the mere killing of the cattle or finding them dead beside the track, did not show negligence sufficient to entitle plaintiff to recover.

Same—Presumptions and Burden of Proof.*—Negligence of a railroad company in killing animals must be shown in order to render the company liable, and it cannot be presumed from the fact that they were upon its tracks and killed by a train.

Trial—Instructions—Application to Case.—The giving of instructions not based on evidence or anything in the record is improper.

Error to Otero County Court; A. D. Wallace, Judge.

Action by Oliver Adcock against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charles E. Gast and J. T. McCorlle, for plaintiff in error.

F. A. Sabine and R. S. Beall, for defendant in error.

BAILEY, J. This action having been brought in the justice court and then taken by appeal to the county court, there were no written pleadings. The proof shows that the plaintiff was the owner of certain cattle two of which were found dead by the side of the railroad of defendant. From the marks upon the cattle and the ground where they were lying near the track of de-

*See second preceding case, and foot-notes.

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fendant, it was apparent that they were killed upon the track and thrown some little distance. A number of people saw the cattle after they were killed, but none saw them killed. No person knew how they were killed, except as circumstances seemed to indicate their being killed by a passing train. The plaintiff testified that he found the hides of the animals a few days after they were killed hanging on a section house belonging to the railroad company. He looked at the hides and told the foreman they were his. He and the foreman prepared a claim statement on a blank furnished by the foreman. Plaintiff subsequently received a letter from the company, and then went to the foreman and demanded the hides. The foreman stated that he had shipped them. Aside from the fact that the cattle were found dead near the railroad, and the hides were in the possession of defendant's foreman, the record is silent as to what became of the bodies of the animals. At the close of the plaintiff's testimony, defendant moved for judgment as of nonsuit. This was overruled, and defendant complains that the court erred therein.

The court properly overruled the motion for a nonsuit, because, independent of the liability of the company for the killing of the animals, it had no right to convert the animals, or any portion thereof to its own use, and the case should have been submitted to the jury upon the question of the conversion, but the court instructed the jury: "If you find from the evidence that the defendant negligently ran its engine against the cattle and by reason of the wounds received thereby they died, the defendant was liable," and refused to instruct the jury that "the mere killing of the animals by the train or finding them dead beside its railroad does not of itself show negligence sufficient to entitle the plaintiff to recover." In these two particulars the court erred. The plaintiff could not have recovered for the killing of the animals except by showing the negligence of defendant, and negligence on the part of the railroad company in killing live stock is not to be presumed from the mere fact that the stock upon its tracks was killed by a train. The giving of instructions not based upon the evidence of anything in the record is improper. *Robinson v. D. & R. G. R. R. Co.*, 24 Colo. 98, 49 Pac. 37. There is no evidence in this case of the negligence of defendant in maintaining and operating its trains or otherwise.

Under the facts as they appear in the record of this case, the matter should have been submitted to the jury on the sole question of the conversion of the animals by the defendant and, for the error of the court in giving the instruction upon the question of negligence, which it did give, and refusing to give those tendered by the defendant, the judgment must be reversed, and the cause remanded.

Reversed.

The CHIEF JUSTICE and GODDARD, J., concur.

DETROIT SOUTHERN R. CO. *v.* LAMBERT.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1907.)

[150 Fed. Rep. 555.]

Trial—Direction of Verdict—Effect of Motion.—On a motion for direction of a verdict, the court must take that view of the evidence most favorable to the party against whom the instruction is asked.

Same—Questions for Jury—Conflict of Evidence.*—Where there was positive testimony that signals were given by a railroad train at a crossing, and also testimony by other witnesses who were where they should have heard such signals if given, that they did not hear them, the question was one for the jury.

Evidence—Opinion of Witness—Matters Directly in Issue.—On the trial of an action to recover damages for the death of a man who was struck and killed by a switching train while driving over a railroad crossing with which he was familiar, and which he crossed often in his daily work as a teamster, it was error to allow another teamster as a witness to state his opinion that there would have been no "unusual danger" in driving upon the track as the deceased did if the train had been going at the usual rate of speed, such statement being in effect of an opinion as to the negligence of the deceased, which was an issue before the jury.

Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Henry T. Hunt, for plaintiff in error.

Wm. D. James, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The deceased, Frank Waller, was struck by a Detroit Southern switch train, consisting of an engine pushing two empty cars, a box and a gondola, while he was in the act of driving a team of horses attached to an empty wagon, across what is termed the "main siding" or track of that company at the Big Etna crossing in Ironton, Ohio. The Big Etna furnace is on the Ohio river in the upper end of Ironton. The

*See foot-notes appended to *Baltimore & O. R. Co. v. Baldwin* (C. C. A.), 21 R. R. R. 380, 44 Am. & Eng. R. Cas., N. S., 380; *Ives v. Wisconsin Cent. Ry. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393; *Keiser v. Lehigh Valley R. Co.* (Pa.), 20 R. R. R. 303, 43 Am. & Eng. R. Cas., N. S., 303.

†For the authorities in this series on the subject of the admissibility of expert and opinion evidence, see foot-notes appended to *Whitney v. Pere Marquette R. Co.* (Mich.), 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to *Tiffin v. St. Louis, etc., Ry. Co.* (Ark.), 21 R. R. R. 113, 44 Am. & Eng. R. Cas., N. S., 113; *Sanitary Dist. v. Pittsburg, etc., Ry. Co.* (Ill.), 20 R. R. R. 145, 43 Am. & Eng. R. Cas., N. S., 145; *Elgin, etc., Traction Co. v. Wilson* (Ill.), 20 R. R. R. 37, 43 Am. & Eng. R. Cas., N. S., 37.

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river here runs in a northwesterly direction. The tracks of the Norfolk & Western and the Detroit Southern railways parallel the river. Between them and the river lies the furnace. A wagon road leads from the furnace to Third street, crossing four tracks, two of the Detroit Southern and two of the Norfolk & Western. The first track is the long siding of the Detroit Southern, the next the main siding or track of the same road, the third the main track of the Norfolk & Western, and the last a siding of that road. These tracks are 13 feet apart from center to center, the distance between the rails being 8 feet. Southwest of the long siding of the Detroit Southern is a short siding or stub switch, which ends near the laboratory building of the furnace, about 60 feet west or northwest of the crossing. On the wagon road, 25 feet from the long siding, on its river side, stood the furnace scales. The accident occurred about 5:30 p. m., on April 5, 1904, about the time the teamsters and men on the day term were quitting work at the furnace, where some 200 were employed. At this time both the short and the long sidings of the Detroit Southern were full of cars. At the crossing a gap variously estimated from 10 to 40 feet in width was left between the side-tracked cars for the passage of teams. Next the crossing on the northwest, the direction from which the Detroit Southern train came, there were first two gondola cars, each 9 feet high, and then a cattle car with solid ends and lattice sides, 12 feet high. Other cars followed, mostly gondolas. The wagon Waller used was 45 inches high from the ground to the top of the bend. He was a man 5 feet and 6 inches in height and was in the habit of sitting on a board laid across the top of the bed. Necessarily, his view of the track was much obstructed; precisely to what extent was a disputed question. Waller was thoroughly familiar with the dangers of the crossing, having been employed there as a teamster for more than two years. Just prior to the accident, he had emptied his wagon at the furnace and started to drive home. When he reached the crossing, a heavy Norfolk & Western freight train carrying some 40 loaded cars, was proceeding northwest on the third track from the furnace. Waller stopped near the furnace scales, the front feet of his horses being between the rails of the long siding or first track. As soon as the Norfolk & Western freight passed, Waller started across and his team was struck, about the shoulder of the near horse, by the front car of the Detroit Southern switch train. Both the horses were killed, the wagon demolished, and Waller received injuries from which he died within a few hours. The plaintiff below claimed the railway company was guilty of negligence in running its train at an unusual and dangerous rate of speed without giving notice of its approach by blowing the whistle and ringing the bell. In defense, the railway company contended it was not running the train at an unusual and dangerous speed, that it did blow the whistle and ring the bell as it approached the crossing, and, however this might be, no re-

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covery could be had, because Waller himself was guilty of negligence in not looking and listening before he attempted to cross the track. Otherwise, he would have observed the approach of the train and could have avoided the collision. The railway company asked for peremptory instructions on both points, which were refused, and a verdict and judgment rendered for the plaintiff. These two rulings and a refusal to exclude certain testimony offered by the defendant are the errors we are asked to correct. The rule is well settled that where a motion is made for a peremptory instruction, the court must take that view of the evidence most favorable to the party against whom the instruction is requested (*Schofield v. Chicago & St. Paul Ry. Co.*, 114 U. S. 615, 619, 5 Sup. Ct. 1125, 29 L. Ed. 224; *R. R. Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463; *Riley v. L. & N. R. R.*, 66 C. C. A. 598, 133 Fed. 904; *Williams v. Choctaw, etc., R. R.* [C. C.] 149 Fed. 104); so that, in this case, the plaintiff below was entitled to receive the benefit of all fair and reasonable inferences from the testimony.

Upon the question of speed, three or four witnesses for the plaintiff testified that the train was running faster, some said much faster, than usual, and there was testimony tending to show that after the brakes were applied, the train ran in the neighborhood of 150 feet before it could be stopped, one car, the gondola, being thrown from the track by the impact. The testimony of the trainmen tended to show the train was not running more than five or six miles an hour. The resulting conflict in the testimony was, of course, for the jury to determine. As to the question of signals, six witnesses testified for the defendant below that signals were given, while four witnesses for the plaintiff below testified they did not hear any whistle blow or bell rung. If we had the right to pass upon it, we should say the weight of the testimony on this point undoubtedly was in favor of the contention of the railway company, but since some of the plaintiff's witnesses were where they ought to have heard the whistle, if it was blown, it seems to us, taking the rule laid down in *N. P. R. R. v. Freeman*, 174 U. S. 379, 381, 19 Sup. Ct. 763, 43 L. Ed. 1014, that there was a conflict of testimony, which was properly left to the jury. This brings us to the alleged negligence of the plaintiff's intestate in failing to look and listen. In considering this, it is necessary to examine the testimony reflecting upon this point with some care.

Martin, one of the witnesses for the plaintiff below, employed at Big Etna, passed over the crossing just behind the Norfolk & Western freight train. He waited between the scales and the main line of the Norfolk & Western, about the edge of the Detroit Southern track, for the Norfolk & Western train to pass. He says he saw Waller with his team near the scales. Then engine of the Norfolk & Western train was passing as he reached the crossing. He did not see or hear any Detroit Southern train. When the Norfolk & Western train had passed, he started across,

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and was about 8 or 10 feet beyond the Norfolk & Western main track, when a man halloed. At that he turned and saw that the Detroit Southern train had struck the team. Ball, another witness for the plaintiff, was sawing cross-ties near the track of the Detroit Southern, about 100 yards northwest from where the accident occurred. When the train was about 50 feet from the crossing, he saw the team, that is, the horses, coming on to the crossing ahead of the train. Henthorn, the engineer of the Detroit Southern train, and Bruce the brakeman in charge was on the front end of the gondola, on the left hand side, both testified that they observed Waller. Henthorn said that he was about three cars and half below the crossing when he first observed him. Waller was then looking straight over the crossing. His horses were standing between the long siding and the short switch runs up to the scale house. When the witness was about half a car length from the crossing, Waller started over, and then the witness applied the brakes and reversed. Bruce testified that it was about three cars' length when he saw Waller sitting in the wagon. When they got about a car length from the crossing, Waller made a move as if he were going to start, and the witness halloed to him just as loud as he could; but instead of stopping, he started to rush on. When the witness first saw Waller, he was sitting in the wagon, looking ahead. He was between the long siding and the short track back of him. His horses' heads were near the rail of the long siding next the furnace. At that time the Norfolk & Western train was passing. The witness supposed Waller was looking at that train. Charles Layne, employed by the company operating the Big Etna furnace, was near the upper end of the long siding about 75 steps from where the accident occurred, walking towards the crossing. He saw the Norfolk & Western freight coming northwest and saw the Detroit Southern yard engine coming southeast. As the Norfolk & Western train got over the crossing, the Detroit Southern yard engine was coming "awful close" to the crossing, and just then Waller drove on to the crossing and the Detroit Southern hit him. This witness heard the Detroit Southern engine whistle and heard the brakeman halloo. He was walking between the Norfolk & Western main line and the Detroit Southern main line. The witness did not see Waller until he reached the Detroit Southern track. He had raised up and he jerked his lines, "jerked back his horses." The train was about a car length from him then.

It will be observed that none of the witnesses, and they are the only ones who saw Waller immediately before the accident, testified that he either looked or listened before driving upon the track. There is an interval between the time when Martin left him near the scales and when the engineer and brakeman saw him sitting in his wagon, not covered by the testimony. Under the circumstances the court below left it to the jury to determine whether he did look and listen; the presumption being, in the

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absence of evidence, that he did. We have carefully considered this testimony, and doubt whether the court was justified in leaving the determination of this question to the jury. It is a matter for very careful consideration whether a fair and reasonable reading of the testimony leaves any opportunity for the conclusion that Waller either looked or listened before driving upon the track. *North. Pac. R. R. v. Freeman*, 174 U. S. 379, 382, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Blount v. Grand Trunk Ry.*, 9 C. C. A. 526, 61 Fed. 375; *C. N. O. & T. P. Ry. v. Farra*, 13 C. C. A. 602, 66 Fed. 496; *Gilbert v. Erie Ry.*, 38 C. C. A. 408, 97 Fed. 747. Martin left him just where the engineer and brakeman saw him later, near the scales. He stopped here to allow the Norfolk & Western train to pass. Martin did the same thing, but before stopping, he moved forward until he was on or near the Detroit Southern track. As soon as the Norfolk & Western train cleared the crossing, Martin moved on. He had only got 10 or 12 feet beyond the last track when his attention was called to the accident. Henthorn and Bruce saw Waller when they were three car lengths or more from the crossing. He was then sitting in the wagon with his eyes fixed straight ahead, where the Norfolk & Western train was passing. He certainly had not gone forward and looked and listened or, instead of sitting still, he would and should have been hurrying across. To look and listen and then sit still is not to look and listen, for one must cross directly after looking and listening. In other words, if you sit still after looking and listening, you must look and listen again. Moreover, he did not look and listen with the attention due under the circumstances, or he would have known that the train was coming. He would not have attempted to cross when it was only a car length away. Again, sitting in his wagon, he could have seen the train for three car length or more; for those on the train saw him. It is a fair contention, therefore, that the only reasonable inference to be drawn from this testimony is that Waller's mind was fixed on the Norfolk & Western train, that he looked only at it and heard no noise but what it made, that he was on his way home, was stopped by the Norfolk & Western train, waited until it passed, and without ever thinking of a possible Detroit Southern switch engine, drove on to his death.

We do not, however, prefer to put the reversal upon this ground, for the reason that, on another trial, testimony may be adduced which may change the situation, and relieve the court from the necessity of directing a verdict upon the ground indicated, namely, that Waller was negligent. As the case stands now, we prefer to dispose of it upon the following question and answer admitted over objection in the testimony of John Morris, a teamster employed along with Waller, and assigned as error:

"Q. If they had been going their usual rate of speed at which you and Frank Waller and other teamsters there knew them to go, would there be any unusual danger for Frank Waller to start across the track as he did? A. I don't hardly think there would."

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This question was objected to, on the ground that it assumed a state of facts which there was no evidence to show existed at the time. The court overruled the objection. In this we think the court erred. While the testimony probably did show that the usual rate of speed in railroad yards of switch engines was from four to six miles an hour, yet the other conditions, bearing upon the question whether it was dangerous or not to attempt to pass under the circumstances, were not established by the testimony or stated in the question. In propounding the question, there was an attempt to substitute the witness for the jury and have him state whether, under all the circumstances, Waller would have been guilty of negligence in starting across the track if the train had been running at its usual rate of speed. Obviously this could not be done.

The judgment is reversed, and the case remanded, with directions to grant a new trial.

GILA VALLEY, GLOBE & NORTHERN RAILWAY COMPANY, Plff. in Err., v. A. J. LYON.

(Submitted November 13, 1906. Decided December 10, 1906)

[27 Sup. Ct. Rep. 145.]

Trial—Question for Jury—Negligence.—Evidence tending to show that a spur railroad track was not a safe and proper structure for the operation of cars is sufficient to carry to the jury, on the question of the negligence of the railway company, an action to recover for the killing of a brakeman while riding on a car which plunged over the end of the spur track, although the evidence for the railway company tended to show that the accident was due to the negligence of a fellow servant in ordering the car to be detached from the train and engine.

Appeal—Prejudicial Error—Instructions.—Charging the jury that, unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable, even if erroneous in that “sole cause” is not synonymous with “proximate cause,” does not prejudice the defendant, where further instructions, given at its request, were to the effect that, if the conductor’s negligence was the proximate cause of the accident, there could be no recovery, and the court’s attention was not specifically drawn to the objection to the word “sole.”

Trial—Reception of Evidence—Expert Testimony.*—The discretion of the trial court is not abused by permitting witnesses who have had practical railroad experience and are familiar with overhead structures and buffers to testify as to whether a buffer at the end of a spur track was a reasonably safe and proper one, and as to whether

*See preceding case, and foot-notes.

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reasonable and proper care had been exercised in so building an overhead structure as to prevent the use of the hand brakes on a freight car until about 100 feet from the end of the spur track.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment which affirmed, on a second appeal, a judgment of the District Court of Gila County, in that territory, in favor of plaintiff in an action to recover damages for the alleged negligent killing of a railway employee. Affirmed.

See same case below (Ariz.) 80 Pac. 337; on first appeal, 71 Pac. 957.

Statement by MR. JUSTICE PECKHAM:

The defendant in error, who was plaintiff below, recovered a judgment against the railroad company, plaintiff in error, in a trial court in Arizona territory, for the negligent killing of her son, which judgment was affirmed by the supreme court of the territory, and the company brings the case here.

The deceased was a brakeman and had been employed by the defendant company as such for a few weeks before the accident occurred in which he lost his life. He acted as one of the brakemen upon the freight train, which was pushed up on a spur track that ran from the main line in the town of Globe, in the territory, to a mining station, about 500 yards away. The accident, which resulted in the death of the deceased, occurred on this spur track on the 14th of July, 1900. The grade of the spur, after leaving the main line, was, for a short distance, level. It then became quite steep upgrade, getting steeper and steeper, until it again became level, under what is termed the tramway house. This was a structure erected over the tracks, and the bottom of it was only 2 feet above the top of the freight cars, and from that tramway structure to the end of the road the grade was about level, and the distance a little over a hundred feet. The track ended on a trestle, with a buffer at the end, which was not calculated to resist a car pushed by an engine, but only to stop one pushed by hand or by the wind. The trestle ended at the side of a canon, and there was at that point an abrupt fall to the bottom of the canon of 75 feet. There was a curve on the spur track, which would prevent the engineer from seeing the end of his train, and he would have to obtain signals from others in order to run his engine. The upgrade was so steep that only a few cars could be taken up from the main track at any one time.

On the occasion of the accident the train started from the main line, and was pushed up grade by the engine in the rear. The deceased was on top of the front car of the train, being farthest away from the engine at the time the train was being pushed up. The conductor was on the car next to that of the deceased, and by his orders the engineer shoved the train as rapidly as he could, and ran it at the rate of 5 or 6 miles an hour, and then after a shove the two cars on which were the

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deceased and the conductor were detached from the train and passed along at that rate of speed under the tramway house and on to the level portion of the road, which ended in about a hundred feet at the side of the canon. The deceased was unable to control the speed of the cars with his brakes, and the car on which he was riding passed along and knocked away the buffer and plunged down to the bottom of the canon. Eye witnesses of the accident immediately descended the side of the canon and found at bottom the car and the dead body of the deceased.

There was evidence tending to show that the spur track was not a safe and proper structure to operate over its length with cars, for the reason that the tramway house was so close to the top of the cars when passing under it that the brakes could not be handled, and there was no sufficient length of road after the train passed under the house during which to get the cars under control and stop them before they arrived at the end of the track and the side of the canon. The only way in which it ought ever to have been done was to have the engine at all times attached to the train, and even then, if anything got out of order with the engine, the train was not under control of the brakeman, on account of the tramway house. The buffer at the end of the track was also asserted to be insufficient, and witnesses were called who testified that the track was not a reasonably safe one upon which to conduct the business of the road.

The company, on its part, gave evidence tending to show that the track was properly constructed; that the buffer was sufficient for the purpose intended, and that the whole structure was a reasonably safe place, and that the accident was caused simply by the flagrant negligence of the conductor, in ordering the two cars to be detached from the train and thus taken away from the control of the engine. It also gave evidence that the buffer was not to be used at the end of the track to stop cars in motion, nor were the hand brakes intended to be so used at that spot, as it was intended that the engine should control the cars and should not be there detached from them. They therefore insist that, when the operation was properly performed, the matters of the low shed, short track, and insufficient buffer were immaterial. It was perdicated upon the fact that the cars should be under the control of the engine, and should not be detached therefrom, as these cars were, under the orders of the conductor.

Mr. Frank W. Burnett for plaintiff in error.

Mr. Waters Davis for defendant in error.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The first question presented by the plaintiff in error is founded upon an exception to the refusal of the court to instruct the jury to render a verdict for the plaintiff in error, on the ground that there was no evidence that the railroad company was guilty of negligence by failing to provide a reasonably safe place for the

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servants of the company to work in; that the cause of the accident was the gross negligence of the conductor in ordering the cars to be detached from the train and engine, and that such negligence was that of a fellow servant of the deceased, and did not form the basis for a recovery against the defendant. We are of opinion that, taking the whole evidence, enough was proved on the part of the plaintiff below to make it proper to send the case to the jury on the question of the negligence of the company.

The next question arises in regard to the charge of the court upon the proximate cause of the accident, whether it was the negligence of the defendant company in not furnishing a proper and reasonably safe place for its employees to work, or that it was the negligence of the conductor (a fellow servant of the deceased) in ordering the cars detached from the engine. The court charged that—

“The conductor of the train was a fellow servant of the man who was killed, and if the accident was brought about solely by the negligence of the conductor of the train, then the defendant company is not liable; or if the accident was brought about by the negligence of the conductor and the negligence of the man who was killed, the defendant company is not liable. If, however, the accident was caused by a failure of the defendant company to provide a reasonably safe place to perform the work in which the man who was killed was engaged, then the defendant company is liable in damages for the death, if it was negligent in not providing such safe place.

“The fundamental question, therefore, for you to determine in this case is, What was the cause of this accident; what brought it about?

“If you find that this accident was caused solely by the action of the conductor in the method which he employed in putting cars on the spur at the time in question, then you should find a verdict for the defendant company, and you should not award any damages to the plaintiff in this case; or if you should find that the dead man has, through his own negligence, brought about this accident or contributed to it, then you should find for the defendant, and you should not award any damages in this case.

“On the other hand, if you find that the defendant company was negligent in not providing a reasonably safe place for the performance of the work, you should find for the plaintiff and award her damages, provided that the negligence of the defendant in not providing such a safe place was the cause of the accident, or contributed to the accident.

“To find for the plaintiff, it is not enough that you should find that the premises were unsafe, or that the defendant company was negligent in that respect, in not providing a safe place; you must also find that the place was unsafe, and that the accident was brought about or contributed to by reason of that unsafe place. That is, if you should find that the act of the conductor was the sole, or if you should find that it was the

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proximate, or the procuring, cause of the accident, then you should not award damages; but if you find that the accident was caused by the acts of the conductor and also by the negligence of the defendant company in not providing a safe place to do the work, then you should find damages for the plaintiff. In other words, in order to award damages to the plaintiff, you must find, first, that the defendant company was negligent in not providing a safe place to do the work, and that such negligence was the cause of the accident or contributed thereto. If you find the accident was brought about solely by the acts of the conductor, you should not award damages. If the acts of the conductor alone did not cause the accident, but the accident was contributed to by the negligence of the defendant company by not providing a safe place to work, then you should award damages."

Again:

"Was the place where the deceased was working a reasonably safe place for the performance of the work to be done there,—a reasonably safe place, considering the character of the work to be done and the character of the premises?

"If you find it was not reasonably safe, and the defendant company was negligent in that respect, did that fact have anything to do with the accident, or was it caused by the negligence of the conductor of the train alone?

"If it was caused solely or procured or brought about by the negligence of the conductor, then the defendant is not liable. If the negligence of the defendant company contributed to the accident, then the defendant is liable, provided the dead man himself was not guilty of any negligence which contributed to the accident."

The company now finds fault with this charge, on the ground that it was error to charge that unless the accident was caused solely by the action of the conductor, the defendant was liable: that "sole" cause is not synonymous with "proximate" cause, as the action of the conductor may not have been the sole, although at the same time it may have been the "proximate," cause, and if it was the proximate cause, the company would not be liable. The rule would seem to be that if the negligence of the company had a share in causing the injury to the deceased, the company was liable, notwithstanding the negligence of a fellow servant contributed to the happening of the accident. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *Ellis v. New York, L. E. & W. R. Co.*, 95 N. Y. 546, 552. But, in addition to the main charge above set forth, the court charged the jury at the request of the counsel for defendant as follows: that if the manner of throwing the cars, as testified to, were unsafe, and the conductor caused the cars to be so thrown by that unsafe method, and if such act of the conductor was the proximate cause of the accident, and that such unsafe method was adopted by the conductor without the authority or direction of the defendant, the plaintiff cannot recover; that if the jury be-

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lieved that the accident to the deceased was proximately caused by the negligence of the conductor, it was immaterial whether the deceased had had previous experience as a brakeman, or not; that, although the jury might believe from the evidence that other, better, and safer appliances might have been used by the defendant company, yet the defendant was not thereby rendered liable in this action, if the proximate cause of the accident was the negligence of the conductor in the manner in which he conducted the work on the occasion in question; that, as the conductor was the fellow servant of the deceased, the defendant could not be held liable if the accident was proximately caused by negligence on the part of the conductor; that if the jury believed, from the evidence, that the appliances furnished by the defendant company were defective, yet if they further believed, from the evidence, that the conductor was negligent in the manner in which he conducted the work on the occasion, and that such negligence was the proximate cause of the accident, without which such accident would not have happened, then the jury should find for the defendant.

We think the defendant received no prejudice from the charge as given, taken in connection with the defendant's requests to charge, which were complied with. If the defendant had desired to obtain a more specific charge in relation to the distinction between "sole" and "proximate" cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word "sole," and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question. *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 659, 25 L. ed. 487, 491. The requests to charge as given show the jury had its attention drawn to the proximate cause, and that if the conductor's negligence were the proximate cause, the plaintiff could not recover.

A third question arises upon the admission of evidence. Certain of the witnesses for plaintiff were called to prove that, in their opinion, the company had not furnished a reasonably safe place for its employees to work in. This was objected to on the ground that the witnesses testifying to it were not properly experts and should not be permitted to testify. One witness, who testified that the buffer was not a reasonably safe and proper one, said that he had been railroading for fifteen years, following the business of trackman during that time; that it was his business to go over the track and see if it was in proper shape, and that he had had something to do with the construction of a railroad; that he was familiar with the construction of tracks, trestles, and buffers; that that was what he had had to do; that overhead structures came under another department; that he considered it unsafe for the reason that the buffer would afford an obstruction to the wheels and that the car would slide off the trucks and go over into the ravine.

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Another witness said that he had been working on railroads for twenty years, and that from his experience he had had occasion to become acquainted with structures over tracks, over bridges and highways, and buffers at the end of chutes and tracks, and as to the control of the cars, their operation and the operation of the brakes on the cars, the stopping cars, the resisting power of buffers, etc. He said that, in his opinion, the tramway house was too close to the top of a car, and that it was an impediment to the operation of the hand brake of the car, and that the buffer at the end was not an effective obstruction. Evidence was given by other witnesses, by depositions, in regard to the structure over the railroad track and the character of the buffer.

In the case of all the witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with structures and the character of buffers mentioned in the evidence. There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case. *Congress & E. Spring Co. v. Edgar, supra*; *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 484, 36 L. ed. 510, 512, 12 Sup. Ct. Rep. 731.

There is no error in the record and the judgment is affirmed.

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(Supreme Judicial Court of Massachusetts, Bristol, Jan. 3, 1907.)

[79 N. E. Rep. 873.]

Negligence—Contributory Negligence — Imputed Negligence.*—

Where a person was injured through the negligence of a third person and the concurring negligence of one with whom she was riding as guest, the driver's negligence would not be imputed to her, where in entering and continuing in a conveyance she acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to act for her own protection.

*For the authorities in this series on the subject of imputed negligence, see foot-note appended to *Kane v. Boston Elev. Ry. Co.* (Miss.), 20 R. R. R. 381, 43 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Jacksonville Elec. Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

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Exceptions from Superior Court, Bristol County; Loranus E. Hitchcock, Judge.

Action by one Shultz against the Old Colony Street Railway. From a judgment for defendant, plaintiff brings exceptions. Exceptions sustained.

John T. Coughlin and *David R. Radovsky*, for plaintiff.

Jas. M. Swift, for defendant.

RUGG, J. This case fairly raises the question as to whether the negligence of the driver of a vehicle is to be imputed to a guest riding with him gratuitously and personally in the exercise of all the care which ordinary caution requires. The first case in our own court which occasioned any discussion as to the identification of a passenger with a driver was *Allyn v. Boston & Albany Railroad Company*, 105 Mass. 77. The injuries out of which this action grew were received at a crossing at grade of a highway and steam railroad. The plaintiff personally failed to exercise any care for his own safety at a place so well-recognized as one of danger, and sought to recover by screening himself behind the due care of the driver. The court says respecting this contention: "If the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that Haskell was in the exercise of due care, not only in the management of his horse, but in using the necessary precaution to guard against danger from passing trains."

The subject was next before the court in *Randolph v. O'Riordan*, 155 Mass. 331, 29 N. E. 582. Here the plaintiff hired a hack of one of the defendants for the purpose of attending a funeral, and exercised no control over the actions of the driver of the carriage other than the purpose of hiring indicated. The injury occurred by reason of the negligence of the driver of the hack in which the plaintiffs were riding and the concurring negligence of the driver of another carriage. After repudiating the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, and referring with approval to *Little v. Hackett*, 116 U. S. 366, 375, 6 Sup. Ct. 391, 29 L. Ed. 652, and quoting from *Allyn v. Boston & Albany R. R.* the sentence above quoted, the court proceeds: "This was very different from saying that Haskell's negligence was to be imputed to the plaintiff if he had been a passenger in a hack of which Haskell was the driver. It was merely saying that if in a dangerous place one person trusted another person to look out for him, he must show that such person used due care."

In *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001, the lower court was asked to rule "that if the accident was not due to the negligence of the defendant's driver alone, but was due partly also to the negligence of the plaintiff's driver, Marshalen, he could not recover." This was refused, but it was ruled that if the plaintiff "trusted to Marshalen the sole care and management of the team in which they were riding, and

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where the injured and the driver do not occupy the position of master and servant, passenger and carrier, parent and child, and where the plaintiff is himself in the exercise of due care, having no reason to suspect carelessness or incompetency on the part of the driver, and is injured by the concurring negligence of the driver of the vehicle and some third person, the guest is not precluded from recovery against the third person by reason of the negligence of the driver. In *Elyton Land Co. v. Mingea*, 89 Ala. 521, at page 528, 7 South. 666, at page 667, the court says: "The rule must be regarded as now fully settled, both in England and America, and certainly in this state, that the negligence of the driver of a vehicle cannot be imputed to a passenger therein, when the passenger is free from personal negligence, and has no control over the driver, and has not been guilty of any want of care in his selection." The facts in this case were somewhat similar to those in *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001, but the statement of the governing principle here and in the two following cases clearly includes facts like those now before us. *Birmingham Ry. & Electric Co. v. Baker*, 132 Ala. 507, 31 South. 618, and *Vormus v. R. R. Co.*, 97 Ala. 327, 331, 12 South. 111. In *Colorado & So. Ry. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, the rule was laid down as applicable to occupants of private conveyances, that in case of a person injured by the negligence of a defendant, and the contributory negligence of one with whom the injured person is riding as guest or companion, such negligence was not imputable to the injured person; although the exception to this rule was recognized that when the injured person was in a position to exercise authority or control over the driver, or was guilty of negligence, or failed "to exercise such care under the circumstances as he could, and should, exercise under the particular circumstances, to protect himself." The same rule has been declared by the Supreme Court of Arkansas, in *Hot Springs St. Ry. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. In Illinois in cases like the one at bar the negligence of the driver is not imputed to the guest. *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 492, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; *W., St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *West Chicago St. Ry. Co. v. Dougherty*, 209 Ill. 241, 70 N. E. 586; *Christy v. Elliot*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196.

A long series of decisions in Indiana supports the same view. It is forcibly expressed in *Knightstown v. Musgrove*, 116 Ind. 121, at page 123, 18 N. E. 452, at page 453, 9 Am. St. Rep. 827, as follows: "The general principle deducible from the decisions is, that one who sustains an injury without any fault or negligence of his own, or of someone subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect or duty occasioned the injury, even though the

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negligence of some third person with whom the injured person was not identified as above may have contributed thereto. Before concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law enjoined upon him." *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Louisville R. W. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; *Chicago, etc., R. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Lake Shore & Mich. Southerly Ry. v. McIntosh*, 140 Ind. 461, 472, 38 N. E. 467; *Indianapolis St. Ry. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571. The Supreme Court of Iowa follows the same rule, using the language in *Nesbit v. Town of Garner*, 75 Iowa 314, at page 319, 39 N. W. 516, at page 518, 1 L. R. A. 152, 9 Am. St. Rep. 486, after saying that the relation of principal and agent must exist in fact in order to bar a recovery, that: "The law will not create or presume the relation from the mere fact that he accepted the invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant." The like doctrine has been adopted in Kansas (*Leavenworth v. Hatch*, 57 Kan. 57, 45 Pac. 65, 57 Am. St. Rep. 309), and in Kentucky in *Cahill v. Cincinnati, etc., Ry. Co.*, 92 Ky. 345, 355, 18 S. W. 2. See, also, *Louisville Ry. Co. v. Anderson* (Ky.) 76 S. W. 153. The same rule has been followed in *State v. B. & M. R. R.*, 80 Me. 430. 446, 15 Atl. 36, and *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668. An exception appears to exist in Maine, not founded on principle, but based upon statutory provisions, in actions against municipalities for injuries caused by defects in highways, where it is held that the rider even though a guest is responsible for the negligence of the driver. *Barnes v. Rumford*, 96 Me. 315, 52 Atl. 844. In Minnesota the rule respecting imputed negligence, excepting where the relation of parent and child or guardian and ward exists, is that "Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct nor participated therein nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agency employed to execute such

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common purpose, negligence of the one in the management thereof will be imputed to the others." *Koplitz v. St. Paul*, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74; *Teal v. St. Paul City Ry.* (Minn.) 104 N. W. 945.

The same general rule prevails in Missouri (*Dickson v. Mo. Pac. Ry. Co.*, 104 Mo. 491, 504, 16 S. W. 381; *Holden v. Mo. Ry. Co.*, 177 Mo. 456, 76 S. W. 973; *Johnson v. St. Joseph*, 96 Mo. App. 663, 71 S. W. 106), in Maryland (*Baltimore & Ohio R. R. v. State*, 79 Md. 335, 344, 29 Atl. 518, 47 Am. St. Rep. 415. See *Consolidated Gas Co. v. Getty*, 96 Md. 683, 54 Atl. 660, 94 Am. St. Rep. 603; *United Rys. & Elec. Co. v. Beidler*, 98 Md. 564, 56 Atl. 813), in New Hampshire (*Noyes v. Boscawen*, 64 N. H. 361, 368, 369, 10 Atl. 690, 10 Am. St. Rep. 410), and in California (*Bresee v. Los Angeles Traction Co.* [Cal. Sup.] 85 Pac. 152), and is supported by a long line of cases in New York, beginning with *Robinson v. N. Y. Cent. & Hudson R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1. In *Brickell v. N. Y. Cent. & Hudson R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648, a case like *Allyn v. Boston & Albany R. R. Co.*, *supra*, the rule is held to be applicable only to cases where "the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from the driver by an enclosure and is without opportunity to discover danger and notify the driver of it." "It is no less the duty of the passenger where he has the opportunity to do so, than of the driver, to learn of danger and to avoid it if practicable." But generally in New York, the guest has not been barred of recovery by the negligence of the driver as matter of law, the circumstances in each case having been held to be such as to make the plaintiff's due care a question of fact. See *Robinson v. Met. St. Ry. Co.*, 91 App. Div. 158, 86 N. Y. Supp. 442, affirmed in 179 N. Y. 593, 72 N. E. 1150; *Van Vranken v. Clifton Springs*, 86 Hun, 67, 33 N. Y. Supp. 329; *Morris v. Met. St. Ry. Co.*, 63 App. Div. 78, 71 N. Y. Supp. 321; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Masterson v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 247, 38 Am. Rep. 510; *Phillips v. N. Y. Central & Hudson R. R. Co.*, 127 N. Y. 657, 660, 27 N. E. 978. *Strauss v. Newburgh Elec. Ry. Co.*, 6 App. Div. 264, 39 N. Y. Supp. 998; *Bailey v. Jourdan*, 18 App. Div. 387, 46 N. Y. Supp. 399; *Mack v. Shawangunk* (Sup.) 90 N. Y. Supp. 760. The same rule has been laid down in *Miss. Ry. Co. v. Davis*, 69 Miss. 444, 13 South. 693. See *Illinois Central R. R. Co. v. McLeod*, 78 Miss. 334, 29 So. 76, 77, 29 South. 76, 52 L. R. A. 954, 84 Am. St. Rep. 630. The precise question has arisen in New Jersey, and the doctrine of imputed negligence of driver to a voluntary passenger is not adopted. *Consolidated Traction Co. v. Hoimack*, 60 N. J. Law, 456, 38 Atl. 684; *Noonan v. Consolidated Traction Co.*, 64 N. J. Law, 579, 46 Atl. 770. *Thorogood v. Bryan* is discredited there. *N. Y., Lake Erie & Western Ry. Co. v. N. J. Elec. Ry. Co.*, 60 N. J. Law, 338, 348, 38 Atl. 828; *N. Y., Lake Erie & Western Ry. Co. v. Steinbrenner*, 47 N. J. Law, 161, 54

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Am. Rep. 126. In an exhaustive opinion the Supreme Court of North Carolina has refused to adopt the doctrine of an imputed negligence in *Duval v. Railway Co.*, 134 N. C. 331, 46 S. E. 750, 65 L. R. A. 722, 101 Am. St. Rep. 830; *Crampton v. Ivie*, 126 N. C. 894, 36 S. E. 351. It has been repudiated also in *Ohio Transfer Co. v. Kelly*, 36 Ohio St. 86; *Cincinnati St. Ry. Co. v. Wright*, 54 Ohio St. 181, 193, 43 N. E. 688, 22 L. R. A. 340. In *Met. St. Ry. Co. v. Powell*, 89 Ga. 601, 611, 16 S. E. 118, the Supreme Court of Georgia held that the plaintiff under conditions almost exactly like those in the case at bar might go to the jury. The same is true in North Dakota (*Ouverson v. Grafton*, 5 N. D. 281, 293, 65 N. W. 676), in Tennessee (*Hyde Ferry Turnpike Co. v. Yates* [Tenn.] 67 S. W. 69), in Delaware (*Farley v. Wilmington & N. Elec. Ry. Co.* [Del. Super.] 52 Atl. 543), in Texas (*M., K. & T. Ry. Co. v. Rogers*, 91 Tex. 52, 58, 40 S. W. 956; *G., H. & S. A. Ry. Co. v. Kutac*, 72 Tex. 643, 652, 11 S. W. 127; *Central Texas & N. W. Ry. Co. v. Gibson* [Tex. Civ. App.] 83 S. W. 863), in Virginia (*Atlantic & Danville R. Co. v. Ironmonger*, 95 Va. 625; 29 S. W. 319), in Washington (*Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76), and in Nebraska (*Hajsek v. C., B. & Q. R. R.*, 68 Neb. 539, 94 N. W. 609), although in a case of joint enterprise between the driver and plaintiff, the negligence of the driver has been imputed to the plaintiff (*Omaha & R. V. R. R. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599).

The question of imputed negligence was before the Supreme Court of the United States in *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, where the facts were very similar to *Randolph v. O'Riordan*, *supra*. *Thorogood v. Bryan* was discredited as resting "upon indefensible ground," and the court lays down the rule in this language: "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled in damages from the wrongdoer. And such is the generally received doctrine, unless a contributory cause of the injury has been the negligence or fault of some person towards whom he sustains the relation of superior or master, in which case the negligence is imputed to him, though he may not have personally participated in or had knowledge of it; and he must bear the consequences. The doctrine may also be subject to other exceptions growing out of the relation of parent and child, or guardian and ward, and the like." In the course of this opinion, *Dyer v. Erie Railway Company*, 71 N. Y.

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228, a case on all fours with the one at bar, is cited with approval as a supporting authority. Relying upon *Little v. Hackett* as authority, the federal courts have refused to impute the negligence of the driver to a gratuitous passenger in a private conveyance. *Pyle v. Clark* (C. C.) 75 Fed. 644; *Id.*, 79 Fed. 748, 25 C. C. A. 190; *Griffith v. Baltimore & O. R. Co.* (C. C.) 44 Fed. 574-580; *Union Pacific Ry. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800; *Sheffield v. Central Union Tel. Co.* (C. C.) 36 Fed. 164; *Evans v. Lake Erie & Western Ry. Co.* (C. C.) 78 Fed. 783; *Honey v. C., B. & Q. Ry. Co.* (C. C.) 59 Fed. 427. See *Delaware, L. & W. R. Co. v. Devore*, 114 Fed. 155, 52 C. C. A. 77; *Denver City Tramway Co. v. Norton*, 141 Fed. 599-609, 73 C. C. A. 1.

Text-book writers generally have also expressed the same view. 7 Am. and Eng. Enc. (2d Ed.) 447; 1 Thompson on Negligence, § 502; 1 Shearman & Redfield on Negligence, § 66; Breach on Contributory Negligence, § 115.

If the subject is considered apart from decided cases and upon sound reason, the same conclusion is reached. There is no abstract principle of law by which an innocent person in the full possession and exercise of his faculties and himself using due care, should be prohibited from recovery against a wrongdoer whose tortious act contributes as a proximate cause to his injury. It is familiar law that an injured person may recover against one or both of two wrongdoers between whom there is no concert of action, whose concurring act produces the injury, even though the act of either alone might not have caused any harm, "when no distinction can be drawn between their acts." *Ouligan v. Butler*, 189 Mass. 287-293, 75 N. E. 726; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69. Where the injury has resulted from the negligent act of another, the plaintiff may recover if such negligence was the efficient cause. In other phrase, where the defendant is the doer of a wrong, which causes an injury to a plaintiff, who is free from any contributory negligence, the circumstance that the negligence of a third party also contributed to the injury does not ordinarily bar recovery. The innocent injured plaintiff ought not to go remediless against one, but for whose wrongful act the plaintiff would have been unharmed. Under the conditions existing in the case at bar, recovery by the plaintiff can only be prevented by judicially imposing upon the purely humane, social or benevolent act of hospitality the fiction of assuming the contractual relation of principal and agent between the guest and host. Such relation in fact does not exist. The parties themselves would at once repudiate it, and indeed the association itself is repugnant to the thought of contract. Such a fiction ought not to be resorted to, except under the imperative requirement of some technical legal rule or to accomplish a manifest justice. Its invocation in the present case is not made necessary by such rule and its application only serves to protect a wrongdoer from the natural consequences of his acts, so that it fails of justification on both grounds. In principle apart from

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special rules often enacted by common carriers there seems to be no greater or different duty resting upon the recipient of a gratuitous excursion in a private conveyance to direct the driver in the performance of his duty or to warn him of approaching risk, than is imposed upon a passenger for hire occupying a seat beside a motorman in an electric car or driver of an omnibus. In either case, there is no contractual obligation. It is simply what under all the circumstances may be an exercise of due care. If the doctrine of principal and agent is to be applied to cases like the one now before us, its logic compels the application to the case of the passenger in the hired cab and the imputation of the driver's negligence to him. This seems to be the course followed in *Nicholls v. Great Western Ry. Co.*, 27 U. C. Q. B. 382; *Winckles v. Great Western Ry. Co.*, 18 U. C. C. P. 250. Moreover, it is but a rational extension of the rule to hold the gratuitous passenger, if he is to be precluded from recovery against a wrongdoer by reason of the negligence of his driver on the theory that the latter is his agent, himself liable also in an action of tort to anyone injured by the negligence of this same driver. If he is prevented from availing himself of a right of action for the wrong of another on the ground of the negligence of his agent, the converse of this proposition necessarily holds true. He must be responsible to a child negligently run down in the street by his host, who is driver and assumed agent. The responsibility of the invited guest for the negligence of his host must be co-extensive with the agency. The purpose of the agency is the driving of the vehicle, and hence it follows that the guest will be liable for any injury negligently occasioned in the driving. If the driver's want of care is imputed to the guest when injury is received by him, to the same extent must the imputation exist when harm is inflicted. To thus press the doctrine of imputed negligence to its logical conclusion demonstrates its unsoundness. It is neither just nor reasonable nor consonant with any principle of jurisprudence to require the plaintiff to go remediless for a wrong committed against her by the defendant, which she neither contributed to, was responsible for, nor could have prevented. To send her out of court would be to punish the innocent and discharge the guilty.

The rule fairly deducible from our own cases, and supported by the great weight of authority by courts of other jurisdictions is that where an adult person, possessing all his faculties and personally in the exercise of that degree of care, which common prudence requires under all the surrounding circumstances, is injured through the negligence of some third person and the concurring negligence of one with whom the plaintiff is riding as guest or companion, between whom and the plaintiff the relation of master and servant or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one but for whose wrong his injuries would not have been sus-

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tained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver.

Applying this statement of the law to the present case, the result is that the plaintiff would not be entitled to recover if in the exercise of common prudence she ought to have given some warning to the driver of carelessness on his part which she observed or might have observed in exercising due care for her own safety, nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence. What degree of care she should have exercised, in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by him, depends upon the circumstances at the time of the injury. On the other hand, she would be permitted to recover if, in entering and continuing in the conveyance, she acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to do any act for her own protection.

The requests for rulings presented by the plaintiff were not correct propositions of law and were properly refused, but the portion of the charge excepted to failed to express with accuracy and fulness the rights of the plaintiff and the liability of the defendant to her. The jury were instructed to treat the plaintiff as identified with the driver, and burdened with his negligence. For the reasons we have stated and under the circumstances disclosed, this was not an accurate statement of the law.

Exceptions sustained.

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(Supreme Court of Florida, Division B. Feb. 13, 1907.)

[43 So. Rep. 235.]

Appeal—Trial—Sequestration of Witnesses.—The sequestration of witnesses from the courtroom during a trial is a matter for the exercise of a sound judicial discretion by the trial court, and its action will not be disturbed unless it appears there has been an abuse of such discretion.

Trial—Exclusion of Witnesses.—A party to a cause should not ordinarily be excluded from the courtroom because he is also a witness, and this doctrine applies to the agent of a corporation whose duty it is to look after the interests of the corporation in the case on trial, but, where such an agent is not excluded from the courtroom during the trial, and is not put on the stand as a witness, and nothing was offered to be proved by him, the corporation does not show any injury of which it can complain because the court refused to except the agent from an order excluding all the witnesses from the courtroom during the trial.

Railroads—Injury to Person on Track—Pleading.—Where a declaration in an action against a railroad company for damages alleges that plaintiff "had occasion to walk a short distance on the railroad track of the defendant," and was struck and run over by one of its engines, such allegations are sufficient to authorize him to testify that at the time and place of the alleged injury he was walking on the track of the defendant railroad.

Evidence—Opinion Evidence.*—A witness who had "railroaded" for 16 years, and one who had been traveling on railroad trains for 20 years, may give their opinions as to the speed at which a train was running; they being present, and seeing the moving train.

Same—Speed of Trains—Regulation by Ordinance.—The city of Lake City is authorized by its charter, as well as by general law, to pass an ordinance prescribing the speed of trains and engines within the corporate limits of said city, not in conflict with section 2664, Rev. St. 1892, but under said section such an ordinance cannot apply to the speed of a train running on a track located on a "traveled street," if it conflicts therewith.

Trial—Remarks of Counsel.†—Certain language used by the plaintiff's attorney in his address to the jury held to be an abuse of the privileges of counsel, upon which the comments of the judge to the

*See foot-notes appended to *Verrone v. Rhode Island Sub. Ry. Co.* (R. I.), 21 R. R. R. 685, 44 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to *Colorado & S. Ry. Co. v. Webb.* (Colo.), 21 R. R. R. 72, 44 Am. & Eng. R. Cas., N. S., 72.

†For the authorities in this series on the subject of arguments and remarks of counsel reflecting upon the credibility of witnesses, etc., see foot-notes appended to *Southern Ry. Co. v. Simmons* (Va.), 21 R. R. R. 571, 44 Am. & Eng. R. Cas., N. S. 572.

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jury were not sufficient to remove the prejudice which such language was calculated to create.

Same—Instructions—Issues.—A requested instruction predicated upon an hypothesis which limited the grounds of possible negligence to one, when under the evidence there may have been others, for the consideration of the jury, is properly refused.

Railroads—Injuries to Person on Track—Burden of Proof.—Under chapter 4071, p. 113, Laws of 1891, when an action is brought against a railroad company for damages for personal injury, the burden of proving the injury is on the plaintiff; and, this being shown, the burden of showing absence of negligence is on the defendant.

Same—Negligence.†—There is no rule of law that it is not negligence for an engineer to run his engine within a municipal corporation over a street crossing (not through the traveled streets) at the rate of 20 miles an hour if he gives notice by ringing his bell and has his engine under control, and exercises such diligence as is necessary to be observed under the ordinary necessities of the company's business. The question of negligence must always depend upon the circumstances of each particular case.

Same—Sign Boards—Speed Limit.—Section 2264, Rev. St. 1892, requiring signboards at or near the crossings of highways, does not apply to the streets of an incorporated town or city, nor does the speed limit therein provided for apply to any streets except those traveled streets of a city upon or through which a track is located.

Same—Contributory Negligence.‡—A railroad company has not only a right, but it is its duty, to operate its trains, and while it should always observe reasonable precautions to prevent injury, it is not required to observe unreasonable ones. People who walk on the tracks must take notice of these considerations, and should exercise a prudence commensurate with the known risks. If they fail to do so and are injured, they are themselves guilty of negligence, and, in order that damages may be recovered by any one so injured, negligence of the railroad company must have existed and must have been the proximate cause of the injury; for, if the heedlessness or lack of prudence of the party injured was the sole proximate cause of the injury, he cannot recover damages, however negligent the railroad company may otherwise have been.

Error to Circuit Court, Columbia County; Bascom H. Palmer, Judge.

Action by Sam Smith against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant brings error. Reversed and remanded.

The defendant in error, Sam Smith, hereinafter called the

†See generally, foot-notes appended to *Golinvaux v. Burlington C. R. & N. R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185.

‡For the authorities in this series on the subject of the care required of a person about to cross railroad tracks, see foot-note appended to *Louisville & N. R. Co. v. Ueltschi's Ex'rs* (Ky.), 21 R. R. R. 660, 44 Am. & Eng. R. Cas., N. S., 669.

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plaintiff, sued the plaintiff in error, hereinafter called the defendant, in the circuit court of Columbia county. The declaration contains three counts. The first in substance charges that on the 24th of April, 1905, the plaintiff had occasion to walk a short distance on the railroad track of the defendant at a point about 300 yards west of the Union Passenger Station in Lake City, in Columbia county, and about 20 yards east of where one of the public streets of said city crossed the said track of the defendant, the same being used as a public crossing "in the usual course of foot travel as has been and was then the custom then and there and before and since to be used as a public thoroughfare by the citizens of said Lake City with the knowledge and consent of the said defendant then and there and since then and for several years previous to said date with the knowledge and consent of said defendant, and while the plaintiff was then and there using due caution as a reasonable and prudent man and without any negligence on his part"; that the defendant did then and there, by its agents, etc., run one of its trains at a great and unlawful rate of speed, and without giving any warning of the approach of same by ringing a bell or blowing a whistle, and carelessly and negligently and wantonly run said train unlawfully as aforesaid along the said track, and violently strike and run over the plaintiff and crushed and mashed off both of his legs, rendering him incapable of earning a living, and causing him great pain and suffering and permanent injury; that plaintiff at the time of the injury was a strong and healthy man, 30 years old, and was earning from \$1.50 to \$2 per day; that he is uneducated and unable to earn a living except by manual labor, and is without means of support; that the train was running at a great and unlawful speed, without ringing a bell or blowing a whistle, along a public and much traveled thoroughfare of the city, and within 20 yards of a public street crossing on a thickly populated section of the city.

The second count, in addition to the allegations of the first count, charges that the agents of the defendant were grossly negligent in not seeing the plaintiff, who was in full view of the train, and in not giving him warning by blowing the whistle or ringing the bell.

The third count, in addition to the allegations of the two preceding counts, avers that the plaintiff, under the circumstances, had a right to believe that the defendant would operate its trains at the speed required by law, and that he would be warned of the approach of the train by the ringing of the bell and blowing the whistle, and, if such had been the case, he could and would have gotten off the track to have prevented the injury to himself, and that the alleged conduct of the defendant was gross negligence. The plaintiff claims \$25,000.

The defendant, by its attorney, A. J. Henry, filed pleas of not guilty, and that the supposed injury of the plaintiff was caused by his own negligence.

Replication was filed, a trial had, a verdict rendered for the

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plaintiff for \$1,750, a judgment entered for that amount and costs against the defendant. From this judgment a writ of error was sued out. Other pertinent facts will be stated in the opinion.

Geo. P. Raney, for plaintiff in error.

F. P. Cone, for defendant in error.

HOCKER, J. (after stating the facts). The first assignment of error is based on the ruling of the court refusing to except Baya Harrison from an order excluding all the witnesses from the courtroom during the trial. The defendant moved to except Mr. Harrison because he was not only a witness for the defendant, but also because he had prepared the case for the trial, and stood in the position of client as a direct representative of the defendant. The plaintiff objected to this motion, and it was denied. The sequestration of witnesses from the courtroom is a matter for the exercise of a sound judicial discretion by the trial court, and its action will not be disturbed unless it appears there has been an abuse of such discretion. The condition of the law on this subject seems to be fairly stated in 3 Wigmore on Evidence, § 1841. It would seem that a party to the cause should not ordinarily be excluded from the courtroom because he is also a witness, and this doctrine would apply to the agent of a corporation whose duty it was to look after the interest of the corporation in the case on trial. See *Seaboard Air Line Ry. v. Scarborough* (decided June term, 1906, of this court). 42 South. 706. In the case at bar, however, Mr. Harrison was not excluded from the courtroom during the trial. He was not put on the stand as a witness, and nothing was offered to be proved by him. It does not appear, therefore, that the defendant was injured by the ruling of the court. *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879; *The Barke Havre*, 1 Benedict's Dist. Ct. Rep. (U. S.) 295, Fed. Cas. No. 6,232; *Central Railroad & Banking Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Ryan v. Couch*, 66 Ala. 244; 1 Greenleaf on Ev. (16th Ed.) §§ 432, 432a.

The second assignment of error is based on the action of the court in permitting the plaintiff to prove by his testimony that at the time and place of the alleged injury he was walking on the track of the defendant's railroad. The contention is that the declaration does not allege that he was walking on the track when injured, but that "he had occasion to walk a short distance on the railroad track of the defendant." We think that this allegation, taken in connection with the one that he was struck and run over, shows that he was on the track when injured.

The third and fifth assignments are based on the action of the court in permitting witnesses who were not experts to give their opinions as to the speed the train was running which struck and injured the plaintiff. One of these witnesses had "railroaded" for 16 years, and the other had been traveling on trains for 20 years. We do not think the contentions made are ten-

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able. *Louisville & N. R. Co. v. Jones*, 50 Fla. 225, 39 South. 485; 3 Wigmore on Ev. § 1977, note 2.

The fourth assignment of error is not argued.

The sixth assignment is based on the action of the court in granting the motion of the plaintiff to strike from the evidence Ordinance No. 17 of the city of Lake City, and to withdraw the same from the consideration of the jury, over the objection of the defendant. The ordinance had been introduced by the defendant and is as follows:

“Speed of Trains.

“Section 1. It shall be unlawful for any railroad company to run or operate its engines or trains within the corporate limits of Lake City with or at a greater speed than as follows, to wit: eight miles an hour within one-fourth of a mile of its passenger station, and fifteen miles an hour within one-half mile of its passenger station.

“Sec. 2. It shall be unlawful for any engineer or conductor to operate or run an engine or train within the corporate limits of Lake City at a greater rate of speed than eight miles an hour within one-fourth of a mile of its passenger station or fifteen miles an hour within one-half a mile of its passenger station.

“Sec. 3. Any corporation or person violating the provisions of this ordinance shall be punished by a fine not exceeding twenty-five dollars or imprisonment not exceeding ten days.”

The grounds of the motion were that the corporation of Lake City possessed no authority under its charter or under the law to make or enforce said ordinance within its corporate limits; the subject being exclusively regulated by the statutes of the state. The contention here of the defendant in error is that the ordinance is merely a police regulation that would not relieve the plaintiff in error from liability. We are referred to no statute in this state which would deprive the city of authority to pass and enforce such an ordinance in its entirety. The only statute which seems to bear upon the question which we have found is section 2264, Rev. St. 1892. That section is as follows: “Every railroad company whenever its track crosses a highway shall put up large sign boards at or near said crossing with the following inscription in large letters on both sides of the boards, ‘Look out for the cars.’ In all incorporated cities the said company shall cause the bell on the engine to be rung before crossing any of the streets of a city, and their trains shall not go faster through any of the traveled streets of a city than at the rate of four miles per hour.” It is plain that the first sentence of this section does not apply to the streets of a city, for the subsequent sentence provides the precaution to be used before crossing them, viz., that the engine bell shall be rung. This last sentence in its last clause then provides a speed limit of four miles through the traveled streets of a city. This clause does not seem to be intended to fix a speed limit where a track simply crosses a street, and is not located upon a street. To give it such a

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construction might, in some instances, make the law unreasonable. We think it was intended to fix the speed limit where a railroad track is located upon a traveled street, where the danger of injury to persons is greatest and where the greatest precautions are necessary. In so far as the ordinance conflicts with the statute, it would, of course, be inoperative. It could not apply to the speed of a train running on a traveled street. But the ordinance undertakes to limit the speed of trains within the entire corporate limits to 8 miles an hour within one-fourth of a mile of the passenger station, or 15 miles an hour within half a mile of the passenger station. It is apparent that the ordinance is much broader than the statute. As to the power of the city to pass the ordinance having this broader application, it seems to us that it is ample. Section 33, c. 5350, p. 425, Laws 1903, amending previous acts chartering the city of Lake City, gives the city power to pass "all ordinances necessary to the health, peace, convenience, good order and protection of the citizens." Independent of this provision, it would seem that the city had power to pass and enforce such an ordinance as a police regulation. 3 Abbott's Municipal Corporations, §§ 853, 854; *Evison v. Chicago*, St. Paul, Minneapolis & Omaha R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434, and note. It is in proof in the case at bar that the plaintiff was injured at a point in the city limits 2,026 feet from the passenger station, in the trackyard of the Seaboard Air Line and the Atlantic Coast Line Railroad Companies, somewhere between 100 and 425 feet of a street crossing. There was proof tending to show that the train which injured the plaintiff was running at from 10 to 12 miles an hour, and other proof tending to show a greater speed. The defendant was charged with negligently running its train at a great rate of speed at the time the injury occurred. The question of negligence was to be determined by the jury, and whether the train was or was not exceeding the speed limit of the ordinance entered into the question of its negligence. Its own testimony in connection with the ordinance tended to relieve the defendant of negligent conduct in this regard, and, without meaning to say that compliance with the ordinance would exempt a railroad company from the charge of negligence under all circumstances, we think in this case the ordinance was competent evidence, as no extraordinary conditions existed which would have imposed on the company a greater degree of care than that imposed by the ordinance; for, as we have said, the injury occurred in the trackyards, and not upon a street or crossing, in open daylight, and under circumstances which show great negligence on the part of the plaintiff. Only one person besides the plaintiff appears to have been walking in the trackyard at the time. The plaintiff appears to have been a young man in the full possession of his faculties. He was walking heedlessly along on the track of the Atlantic Coast Line Railway. He saw the Atlantic Coast Line passenger train coming on this track, and, without looking or taking any sort of precaution, he went diagonally

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across to the track of the defendant, and stepping almost in front of a moving train, was knocked off, and injured.

Seventh assignment of error: The plaintiff propounded this question to Ben Jones, one of the witnesses, viz.: "Up and down these two tracks and on these two tracks running from Marion street up to where this man was hurt, I ask you if that is or is not frequently used by people walking?" The answer was, "Yes." This question was objected to as leading and as being irrelevant and immaterial. The record does not otherwise describe or identify Marion street. The plaintiff in his brief contends that it is identified by the map filed by the defendant. The map shows a street crossing the tracks near the point where the plaintiff was injured, but no name is given it. This matter should not have been left in obscurity. That a question is leading is no ground for reversal. *Anthony v. State*, 44 Fla. 1, 32 South. 818.

Eighth assignment of error: "The court erred in denying the motion of the defendant to withdraw the case from the jury and declare a mistrial, by reason or on account of the statements of the plaintiff's attorney in his argument to the jury, as shown on page 5 of the bill of exceptions." The plaintiff's attorney in his argument to the jury said "that the plaintiff, a poor negro, who, if he did not get damages out of the defendant railroad company to support him the balance of his life, would be a ward on the county; that the amount of money sued for would not be missed by the defendant, nor would they stop their champagne suppers in consequence of their junketing trips, and also stated that by the reports of the Interstate Commerce Commission there had been many thousands of deaths and injuries by accidents by railroad during the last year." The defendant objected to this method of argument as calculated to prejudice the jury against the defendant, and moved the court to withdraw the case from the jury and order a mistrial. The court sustained the objections to the quoted argument, but denied the motion to declare a mistrial. The judge orally instructed the jury as follows: "You are not to try this case by the number of accidents, or the death rate for or in other states or this state by Railroad Commissioners or otherwise, but you are to try this case solely by the evidence, and you are not to allow this statement of facts to enter into your consideration in your verdict." There was no exception to this oral charge, as being insufficient to correct and remove the prejudice naturally excited by the language of the plaintiff's attorney. We will say, however, that in our opinion it was insufficient. It ought clearly to appear that the court took such action as was sufficient to remove the prejudice and meet the exigencies of the case. Verdicts ought not to be won by such arguments. *Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 16 South. 538; *Galveston, H. & S. A. Ry. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127. No authorities are cited to sustain the contention that it was as a matter of law the duty of the court to discharge the jury because of the objectionable language. It may be that the abuse of argument can be so aggravated as to

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be beyond the power of correction and to impose this duty on the court. We are disposed to think, however, that the question in the case at bar should have been brought here on an assignment based on the fact that the judge's correction was insufficient to overcome its prejudicial effect. *Commonwealth v. Worcester*, 141 Mass. 58, 6 N. E. 700.

The ninth assignment of error is based on the refusal of the court to give an instruction for the defendant which evidently was intended to embody the doctrine contained in the eighth headnote in the case of *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558, and which doctrine was clearly applicable to this case. The instruction, however, as presented, was ambiguous, and no error was committed in refusing to give it.

Assignments 10 and 11 are based on the refusal of the court to give instructions which in effect directed the jury to find a verdict for the defendant, if they believed that the plaintiff was guilty of any negligence, and the injury received by him was caused by such negligence. These instructions ignore the effect of any negligence on the part of the defendant, if the jury should find it was guilty of negligence, and were properly refused. *Florida Cent. & P. R. Co. v. Williams*, *supra*.

Assignment numbered 12 is based on the refusal of the court to give the following instruction: "If you believe from the evidence that the engine and train of the defendant was, at the time and place of the accident, being managed and propelled by the company's engineer and others of its servants than in charge of the train, and that the schedule and regulations adopted by the company regulating [regulated] the speed of its trains at that place, and that such regulations required its trains to be run at a rate of speed not exceeding six miles per hour, and that the said engineer and other servants of the defendant in charge of the said train violated said order and regulations and propelled the engine and train at an unlawful rate of speed, in disobedience of such orders and regulations of the company, and that there was no negligence imputable to the defendant other than such excessive speed of the train, then your verdict should under the plaintiff's declaration in this case be in favor of the defendant." The engineer stated in his testimony that the regulations of the company fixed the speed limit in the railroad yards at Lake City at six miles an hour. He also admitted that at the time of the injury to the plaintiff his train was rolling in without steam pressure at the rate of 10 or 12 miles an hour. The plaintiff's evidence tended to show the train was running at the rate of from 15 to 20 miles an hour. Granting that there were but two persons to be seen walking in the railroad yard on or near the tracks at the time of the accident, and that there was no occasion for extraordinary precautions, yet the city ordinance, as before stated, fixed the speed limits, and, if the speed at which the train was running was in excess of that fixed in the ordinance, it would be evidence of some negligence on the part of the company. It was for the jury to determine whether such

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negligence existed, and whether it was a proximate cause of the injury. The instruction, we think, was properly refused.

The thirteenth assignment is based on the ruling of the court refusing to give the following instructions, viz.: "The court instructs you that upon the allegation of negligence in this case the plaintiff has the burden of proof, and, if he is guilty of negligence substantially contributing to the injury complained of, you will find for the defendant." This instruction was properly refused. It offends against chapter 4071, p. 113, Laws of 1891, and the decisions of this court interpreting and enforcing the same. Under the statute the burden of proving injury is on the plaintiff, and, this being shown the burden of showing the absence of negligence is on the defendant. *Consumers' Electric Light & St. R. Co. v. Pryor*, 44 Fla. 354, text 381, 382, 388, 32 South 797; *Jacksonville Electric Co. v. Adams*, 50 Fla. 429, 39 South. 183; *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, text 63, 25 South. 338, 79 Am. St. Rep. 149; *Florida Cent. P. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558; *Morris v. Florida Cent. & P. R. Co.*, 43 Fla. 10, text 25, 29 South. 541.

What we have said as to the twelfth we think applies to the instruction refused and made the basis of the fourteenth assignment of error.

The fifteenth assignment of error is based on the refusal of the court to give an instruction which undertakes arbitrarily, and in the abstract as a matter of law, to say that it is not negligence for an engineer to run his engine within a municipal corporation, not through the traveled streets, over a street crossing at the rate of 20 miles an hour if he give notice by ringing his bell, and has the engine under control, and exercises such diligence as is necessary to be observed under the ordinary necessities of the company's business. We are not advised of any such rule of law. The question of negligence must always depend upon the circumstances of each particular case. Authorities cited *supra*.

The trial judge of his own motion instructed the jury that "the law of this state provides that a railroad company, when its track crosses a highway, shall put up large signboards at or near said crossing with the following instructions in large letters: 'Stop, look, and listen!'" It also provides that in all incorporated towns and cities it shall cause the bell of the engine to be rung before crossing any streets of said city or town, and a train shall not go faster through any of the traveled streets or thoroughfares than at the rate of four miles an hour. This was objected to and assigned as error. It is evident that the trial judge attempted to apply each of the provisions of section 2264, Rev. St. 1892, to the facts of this case. The injury to the plaintiff occurred in what the witnesses call the railroad yard in Lake City. This yard is not a street of the city, as an uncontradicted witness positively testifies, though people walked on and about the tracks. There are four tracks at the point where the injury occurred. According to the map filed in evidence, made by the

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county surveyor of Columbia county, there is a street crossing the tracks about 425 feet east of the point where the plaintiff was injured. Defendant's passenger train was going east, on a downgrade, towards the street crossing and the passenger depot. As we have said before, we do not think the quoted section of the statute requiring signboards at or near the crossing of highways applies to the streets of an incorporated town, nor does the speed limit therein provided for apply to any streets, except those traveled streets of a city upon and through which a track is located. We think this charge taken as a whole was erroneous, as applied to the facts of this case, and calculated to mislead the jury. Whether the defendant failed in duty in not seasonably ringing its engine bell so as to warn the defendant of danger, and whether it failed in any other duty which the circumstances required, and whether, if it did so fail, such negligence was a proximate cause of the injury, should under the circumstances have been submitted to the jury; for the duty of a railroad company in operating its trains is always conditioned by the exigencies of any particular situation, and to be ascertained from them, and this is true, independent of the statutory provisions. It must not be forgotten that a railroad company has not only a right to operate its trains, but it is its duty to operate them, and, while it should always observe reasonable precautions to prevent injury, it is not to be required to observe unreasonable ones. People who walk on the tracks must take notice of these considerations, and should exercise a prudence commensurate with the known risks. If they fail to do so, they are themselves guilty of negligence, and, if they are injured, in order to their recovery of damages negligence of the railroad company must have existed, and must have been the proximate cause of the injury; for, if the heedlessness or lack of prudence of the party injured was the sole proximate cause of the injury, he cannot recover damages, however negligent the railroad company may otherwise have been. If an individual, in the possession of his faculties, heedlessly and imprudently places himself in front of a train, even though running at an excessive speed, so close to the engine that the train could not be stopped with the best devices in general use, even if it had not been running at an excessive speed, in time to prevent injuring the individual, and the railroad company did not fail in any other duty demanded by the conditions then known by its employees to exist, a compliance with which might have prevented injury, it cannot be said that its negligence in running at an excessive speed was a proximate cause of the injury. Several other charges given by the court are assigned as error, among them the eighth, fourteenth, sixteenth, and seventeenth. As to the eighth, we think it would have been better if it had been therein clearly stated that to enable the plaintiff to recover on the ground of the alleged negligence of the defendant such negligence must have been a proximate cause of the injury. Charges numbered 14 and 16 are evidently taken from *Florida Cent. & P. R. Co. v.*

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Foxworth, *supra*, and the law stated in headnotes 12, 13, and 15. We think, under the circumstances of this case, these charges were calculated to mislead the jury, as in the case at bar the track of the defendant was not along the street of the city, and the plaintiff at the time of being injured was not attempting to cross the track near a crossing. He got on the track in front of the engine and was walking down the track towards his destination. Charge No. 17 was, we think, misleading as to the measure of damages, and was not in accord with the law as laid down by this court in Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394, text 422, 425, 5 South. 714.

The judgment is reversed and the cause remanded.

TAYLOR and PARKHILL, JJ., concur. SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

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Act of passenger in train, under the circumstances in question, and her fright and subsequent illness, could not reasonably have been contemplated as a proximate result of the false information given by conductor that her destination would be reached in 20 minutes, and that it was the next stop. *Florida, etc., Ry. Co. v. Wade* (Fla.), 611.

Carrier was not liable for mental suffering of plaintiff's wife arising out of fact that she was compelled by reason of failure of second conductor to honor her mileage ticket to borrow \$3.00 from fellow passenger, the first conductor having failed to give her a slip authorizing second conductor to honor her ticket. *Missouri, etc., Ry. Co. v. Welch* (Tex.), 700.

Elements of damages for wrongful ejection. *Missouri K. & T. Ry. Co. v. Smith* (C. C. A.), 50.

Excessive verdict against sleeping car company for refusing plaintiff accommodations in its car, because of mistake made by company's ticket agent. *Pullman Co. v. Pennock* (Tenn.), 179.

Measure of damages for ejection of street railway passenger for refusal to pay additional fare after wrongful refusal to accept transfer tendered by him. *De Board v. Camden Interstate Ry. Co.* (W. Va.), 84.

Probable proximate result of negligence of carrier's employee which was proximate cause of injury to passenger, liability of carrier for. *Florida, etc., Ry. Co. v. Wade* (Fla.), 611.

Degree of Care.

Carrier responsible for any injury to passenger not occasioned by inevitable casualty or some other cause which human fore-

CARRIERS OF PASSENGERS—Continued.

sight could not prevent. *Kline v. Santa Barbara Consol. Ry. Co. (Cal.)*, 41.

Person intending to take passage on train was entitled to same protection as an accepted passenger. *St. Louis S. W. Ry. Co. v. Wainwright (C. C. A.)*, 54.

Station premises must be kept in reasonably safe condition for passengers. *Mangum v. North Carolina R. Co. (N. Car.)*, 596.

Utmost care, diligence and foresight of very cautious person must be exercised by carrier. *Kline v. Santa Barbara Consol. Ry. Co. (Cal.)*, 41.

Ejection.

Ejection contrary to terms of street railway ticket or transfer, on refusal to pay additional fare, is actionable. *De Board v. Camden Interstate Ry. Co. (W. Va.)*, 84.

Of passenger tending transfer, defective through mistake of conductor of other street car, rendered carrier liable only for breach of contract, if only necessary force was used, but where conductor called him a deadbeat and assaulted him, the carrier was also liable for punitive damages. *Little Rock Ry., etc., Co. v. Goerner (Ark.)*, 578.

Refusal or failure to produce evidence of right to transportation or pay fare. *Missouri, K. & T. Ry. Co. v. Smith (C. C. A.)*, 50.

Tender of expired limited ticket and refusal to pay fare, effect of fact that passenger should have been given an unlimited ticket for the amount he paid. *Shelton v. Erie R. Co. (N. J.)*, 70.

Tender of expired ticket and refusal to pay fare. *Shelton v. Erie R. Co. (N. J.)*, 70.

Tender of fare by third person after process of ejection had begun, effect of. *Missouri, K. & T. Ry. Co. v. Smith (C. C. A.)*, 50.

Tender of fare by third person with passenger's consent, effect of. *Missouri, K. & T. Ry. Co. v. Smith (C. C. A.)*, 50.

Infirm passengers, duty of carrier to assist. *Williams v. Louisville & N. R. Co. (Ala.)*, 92.

Infirm passenger, sufficiency of complaint in action for negligence of carrier's employees in assisting. *Williams v. Louisville & N. R. Co. (Ala.)*, 92.

Jars and Jolts.

Negligence in operation of street car was question for jury. *Coffey v. Omaha, etc., Ry. Co. (Neb.)*, 599.

Negligence in prematurely starting train. *St. Louis S. W. Ry. Co. v. Wainwright (C. C. A.)*, 54.

Person intending to take passage on train is entitled to reasonable time to enter car after passengers have alighted. *St. Louis S. W. Ry. Co. v. Wainwright (C. C. A.)*, 54.

Limiting Liability.

Free pass, validity of stipulation of under Ark. Const. art. 17, § 12. *St. Louis, etc., Ry. Co. v. Pitcock (Ark.)*, 79.

Negligence in maintaining signal device between street car tracks was question for jury. *Karr v. Milwaukee, etc., Traction Co. (Wis.)*, 623.

Night signal device was an invitation to passengers to cross track to give signal and to recross to board car. *Karr v. Milwaukee, etc., Traction Co. (Wis.)*, 623.

Not negligence to permit elevated railway passenger to pass from one car to another while train is at standstill, nor in such circumstances is it carrier's duty to warn passengers of existence of space between the cars. *Hogan v. Boston Elev. Ry. Co. (Mass.)*, 167.

CARRIERS OF PASSENGERS—Continued.

Pass, liability of carrier to person riding on. *Marshall v. Nashville Ry. & L. Co.* (Tenn.), 151.

Presumption of Negligence.

Fall of trolley pole from electric car causing injury to person standing at car's stopping place for purpose of taking passage upon it. *Cincinnati Traction Co. v. Holzenkamp* (Ohio), 553.

Proximate cause of passenger's injury, negligence of carrier's employee must be such in order to warrant recovery against carrier. *Florida, etc., R. Co. v. Wade* (Fla.), 611.

Separation of Colored Passengers.

Common-law right of railroad, with respect to interstate passengers, to adopt and enforce rule requiring colored passengers to occupy separate compartments in railroad coaches. *Chiles v. Chesapeake & O. Ry. Co.* (Ky.), 59.

Where conductor permitted negro to occupy seat in white passengers' coach, and, on an altercation over payment of fare, attempted to eject him, thereby creating a panic among other passengers, carrier was liable for injuries received by white passenger through falling from car platform while attempting to escape from the difficulty, although, by a custom prevailing on its road, it had permitted colored passengers, when their own compartment was crowded, to ride in white passenger coach. *Louisville & E. R. Co. v. Vincent* (Ky.), 567.

Who Are Passengers.

Commencement of relation, so as to impose duties upon carrier. *Lexington Ry. Co. v. Herring* (Ky.), 635.

Conductor had no authority to employ plaintiff or permit him to work his passage on the freight train, and hence carrier owed him neither the duty owing to passenger or employee. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 629.

Men engaged in constructing railroad tracks. *Kilduff v. Boston Elev. R. Co.* (Mass.), 166.

Person in car without ticket who fails to tender enough money to pay fare. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

Person signaling interurban car. *Karr v. Milwaukee, etc., Traction Co.* (Wis.), 623.

Person who pays his fare on street car, receives a transfer purchased as of an earlier hour than it should be, and boards another car within the life of the transfer if properly purchased, though after it has on its face become void. *Little Rock Ry., etc., Co. v. Goerner* (Ark.), 578.

CATTLE GUARDS.

See CHILDREN.

CHARACTER.

See PERSONAL INJURIES.

CHILDREN.

See ACCIDENT ON TRACK; DEATH BY WRONGFUL ACT.

Contributory Negligence.

Appreciation by eight year old child of danger of train being backed down upon him while on its tracks by defendant's invitation will not be presumed. *Pittsburg, etc., Ry. Co. v. Simons* (Ind.), 283.

Degree of care required of child. *St. Louis, etc., Ry. Co. v. Sparks* (Ark.), 739.

Degree of care required of children. *Serano v. New York Cent. & H. R. Co.* (N. Y.), 293.

CHILDREN—Continued.

Girl, 10 years old, run over by street car which she saw approaching before she attempted to cross track, was guilty of contributory negligence as a matter of law. *Holian v. Boston Elev. Ry. Co. (Mass.)*, 742.

Of boy between 9 and 10 years old in not looking up and down track for trains as he walked upon it is always question for jury under proper instructions. *St. Louis, etc., Ry. Co. v. Sparks (Ark.)*, 739.

Of child at crossing was question for jury. *Serano v. New York Cent. & H. R. Co. (N. Y.)*, 293.

Of eleven year old boy in attempting to cross street car tracks within less than six feet of the car horses. *Bambace v. Interurban St. Ry. Co. (N. Y.)*, 268.

Permitting child to go into street unattended where it was struck by train at railroad crossing. *Serano v. New York Cent. & H. R. Co. (N. Y.)*, 293.

Damages.

\$10,000 was not excessive for loss of foot by boy between 9 and 10 years old. *St. Louis, etc., Ry. Co. v. Sparks (Ark.)*, 739.

\$20,000 verdict was not excessive where plaintiff, an eight-year-old boy, lost both his legs. *Pittsburg, etc., Ry. Co. v. Simons (Ind.)*, 283.

Evidence.

Previous habit of injured boy to ride on cars was inadmissible where there was no evidence that he attempted to jump upon or ride on the car by which he was injured. *St. Louis, etc., Ry. Co. v. Sparks (Ark.)*, 739.

Imputed Negligence.

Of parents, where child in crossing railroad exercises the care required of an adult. *Serano v. New York Cent. & H. R. Co. (N. Y.)*, 293.

Negligence in failing to block frog of a passing switch, lying in path used by public, was question for jury. *Pittsburg, etc., Ry. Co. v. Simons (Ind.)*, 283.

Negligence in maintaining and operating a switching device that was extremely dangerous, particularly to children, sufficiency of complaint. *Pittsburg, etc., Ry. Co. v. Simons (Ind.)*, 283.

Where judgment against plaintiff was reversed on appeal, costs could not be entered against infant to whose use action was brought by the state, nor against the state. *Annapolis, etc., Ry. Co. v. State (Md.)*, 733.

COMMON CARRIERS.

See CARRIERS.

Act of God, to exempt carrier from liability for loss of goods by reason of, must not be coupled with negligence. *Southern Ry. Co. v. Smith (Ky.)*, 652.

Burden upon carrier to prove that damage to freight was not occasioned by its negligence. *Brennison v. Pennsylvania R. Co. (Minn.)*, 105.

Contributory Negligence.

Negligence of shipper in marking and packing, carrier not liable where it was proximate cause of loss of freight. *Broadwood v. Southern Express Co. (Ala.)*, 562.

Damages.

Loss of profits from delay in delivery of freight, recovery of depending upon whether fulfillment of collateral contract was in contemplation of parties when carrier received the freight for transportation. *Goodin & Goodin v. Southern Ry. Co. (Ga.)*, 590.

COMMON CARRIERS—Continued.

Price for which sale of threshing machine had been made was proper measure of damages where such sale was canceled because of negligent delay in transit, and carrier had implied notice of urgency of shipment. *Missouri Pac. Ry. Co. v. Peru-Vanzdt Implement Co. (Kan.)*, 647.

Delay.

Carrier was liable where goods were damaged by cyclone, since its negligent delay at place of shipment continued to be an active cause until consignee had reasonable time to remove goods. *Alabama Great So. R. Co. v. Elliott & Son (Ala.)*, 656.

Conversion of freight by carrier where its negligent delay in transit causes damages exceeding freight charges due, and carrier refuses to deliver the goods until such charges are paid. *Missouri Pac. Ry. Co. v. Peru-Vanzandt Implement Co. (Kan.)*, 647.

Right of commission agent as consignee to maintain action in his own name for recovery of damages on account of commissions lost by himself through carrier's negligent delay in transporting freight, which resulted in cancellation of sales previously made by such consignee. *Missouri Pac. Ry. Co. v. Peru-Vanzandt Implement Co. (Kan.)*, 647.

Sunday is not to be included in days for which the penalty for failure to deliver freight promptly is allowed by certain South Carolina statute. *Salley v. Seaboard Air Line Ry. (S. Car.)*, 48.

When determining whether carrier had implied notice of urgency of shipment, so as to be liable for special damages from delay, it will be held to have knowledge of seed time and harvest and the general customs relating thereto in the territory where it does business. *Missouri Pac. Ry. Co. v. Peru-Vanzandt Implement Co. (Kan.)*, 647.

Delivery by Carrier.

Duty of carrier to hold shipment when unable to find consignee. *Southern Ry. Co. v. Born Steel Range Co. (Ga.)*, 538.

Negligence of railroad in not discovering and repairing defect in car used as place for delivering shipment of freight. *Ladd v. New York, etc., R. Co. (Mass.)*, 709.

Plea by carrier, sued for nondelivery of goods, was demurrable because it contained no matter of avoidance of the fulfillment of carrier's contract, and failed to show an attempt by notice through the mails or otherwise to effect a delivery. *Broadwood v. Southern Express Co. (Ala.)*, 562.

Railroad, by using car of another company as place for delivering shipment, becomes liable for injuries resulting from defects in such car. *Ladd v. New York, etc., R. Co. (Mass.)*, 709.

Delivery to Carrier.

Beginning of carrier's liability. *Garner St. Louis, etc., Ry. Co. (Ark.)*, 527.

Beginning of carrier's liability as an insurer. *Pittsburg, etc., R. Co. v. American Tobacco Co. (Ky.)*, 586.

Carrier, while holding goods at depot, where it had received them for transportation, though it had no trains scheduled to carry them until the following day, was liable as carrier, and not as warehouseman. *Southern Ry. Co. v. Smith (Ky.)*, 652.

Delivery of freight to and its acceptance by carrier. *Pittsburg, etc., R. Co. v. American Tobacco Co. (Ky.)*, 586.

Delivery of tobacco to carrier before its destruction by fire, so as to charge carrier as an insurer with liability for its loss, though no notice was given to carrier after the loading of the

COMMON CARRIERS—Continued.

tobacco had been completed. *Pittsburg, etc., R. Co. v. American Tobacco Co. (Ky.)*, 586.

Property was received for immediate shipment, though bill of lading had not been issued. *Garner v. St. Louis, etc., Ry. Co. (Ark.)*, 527.

Demurrage.

Railroad has no lien for demurrage on property transported over its road. *Wallace v. Baltimore & O. R. Co. (Pa.)*, 57.

Remedy where railroad refuses to deliver cars loaded with freight and held for demurrage. *Wallace v. Baltimore & O. R. Co. (Pa.)*, 57.

Lien on freight extinguished where it is injured in transit. *Missouri Pac. Ry. Co. v. Peru-Van Zandt Implement Co. (Kan.)*, 155.

Limiting Liability.

Bill of lading's conditions not binding on shipper unless it appears that he assented to them. *Wabash R. Co. v. Thomas (Ill.)*, 618.

Burden on carrier to show shippers assent to conditions of bill of lading. *Wabash R. Co. v. Thomas (Ill.)*, 618.

Consignee was entitled to recover full value of goods, though it exceeded valuation fixed by shipper. *Broadwood v. Southern Express Co. (Ala.)*, 562.

Notice of claim for delay in furnishing cars, effect of non-compliance with stipulation. *St. Louis, etc., R. Co. v. Puckett (Ark.)*, 131.

Stipulation that claim for loss of freight shall be presented within 90 days after date of receipt for the freight was reasonable. *Broadwood v. Southern Express Co. (Ala.)*, 562.

Time within which suit must be brought, validity of stipulation. *St. Louis, etc., R. Co. v. Pearce (Ark.)*, 107.

Right to sell shipment at public auction to enforce collection of freight and storage charges. *Southern Ry. Co. v. Born Steel Range Co. (Ga.)*, 558.

CONNECTING CARRIERS.

See BAGGAGE; BILLS OF LADING.

Delay.

Terminal carrier was not liable for delay caused by act of its station agent in demanding a sum as freight greater than that fixed in bill of lading issued by initial carrier, where it did not appear that the amount demanded was in excess of legal and proper charges according to the usual rates, nor that there existed contractual relations between the carriers. *Goodin & Goodin v. Southern Ry. Co. (Ga.)*, 590.

Limiting Liability.

Replication did not show a waiver by terminal carrier of stipulation that claim for loss of goods must be made within certain time. *Broadwood v. Southern Express Co. (Ala.)*, 562.

Burden of showing that goods were in good order when received by initial carrier, and terminal carrier. *Rolfe v. Lake Shore, etc., Ry. Co. (Mich.)*, 609.

Carrier receiving freight consigned to point beyond its line impliedly agrees to transport it to such point. *Wabash R. Co. v. Thomas (Ill.)*, 618.

Insufficiency of evidence to show that freight was in good order when received by initial carrier. *Rolfe v. Lake Shore, etc., Ry. Co. (Mich.)*, 609.

Subrogation of initial carrier where it had paid damages on account of connecting carrier's negligence. *Texas & P. Ry. Co. v. Eastin & Knox (Tex.)*, 136.

CONSOLIDATION.

See RAILROADS.

CONSTITUTIONAL LAW.

See FELLOW SERVANTS; INTERSTATE COMMERCE; NEGLIGENCE; TICKETS AND FARES.

CONTRACTORS.

See INDEPENDENT CONTRACTORS.

CONTRIBUTION.

See NEGLIGENCE; ANIMALS.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS; CHILDREN; CROSSINGS; DEATH BY WRONGFUL ACT; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; RAILROADS IN STREETS; STOCK, INJURIES TO.

Burden of proof, instruction as to was not erroneous for use of the words "to the satisfaction of the jury." *St. Louis, etc., Ry. Co. v. Sparks* (Ark.), 739.

Combined effect of negligence and contributory negligence; and duty to instruct as to. *Drown v. Northern Ohio Traction Co.* (Ohio), 1.

CORPORATIONS.

See FOREIGN CORPORATIONS; RAILROADS.

COSTS.

See CHILDREN.

CROSSINGS.

See CHILDREN; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; LICENSEES; STREET RAILWAYS.

Burden of proof was on railroad to show that deceased did not look both ways before as well as after he went upon the track. *Choctaw, etc., R. Co. v. Baskins* (Ark.), 431.

Contributory Negligence.

Approaching train discoverable by looking and listening again, when near track, and failure to give statutory signals. *Southern Ry. Co. v. Jones* (Va.), 728.

Approaching train discoverable by stopping and looking again, when near private crossing, and failure to give customary signals. *Annapolis, etc., Ry. Co. v. State* (Md.), 733.

Approach of train discoverable by use of senses of hearing and sight and failure to give signals. *Martin v. Southern Pac. Co.* (Cal.), 722.

Climbing between cars of train obstructing crossing, admissibility of evidence of conduct of others. *Weaver v. Southern Ry. Co.* (S. Car.), 749.

Gates, failure to heed warning given by tends to show gross negligence. *Weaver v. Southern Ry. Co.* (S. Car.), 749.

Livery team passenger's right to rely upon driver's exercise of care and caution. *Cotton v. Willmar, etc., Ry. Co.* (Minn.), 501.

Mistaking light of train for light of station, and continuing to drive upon tracks at a walk without taking any further precautions, and failure to give statutory signals. *Hamblin v. New York, etc., R. Co.* (Mass.), 265.

Must have proximate relation to injury to prevent recovery. *Choctaw, etc., R. Co. v. Baskins* (Ark.), 431.

CROSSINGS—Continued.

Of driver was question for jury. *Martin v. Southern Pac. Co. (Cal.)*, 722.

One approaching railroad crossing is not authorized to assume that persons operating train will not in any way be negligent in its operation. *Hutson v. Southern Cal. Ry. Co. (Cal.)*, 315.

Question for jury. *Hutson v. Southern Cal. Ry. Co. (Cal.)*, 315.

Reaching railroad crossing by walking on track, effect on care due him from railroad. *Bowles v. Chesapeake & O. R. Co. (W. Va.)*, 309.

Damages.

Punitive damages for failure to give statutory signals, under certain South Carolina statute. *Osteen v. Southern Ry. (S. Car.)*, 300.

Degree of care required in operating trains over highway crossing in municipality where view is obstructed is such as is commensurate with the danger there existing, but the railroad is not insurer of safety of travelers using the crossing. *Weaver v. Columbus, etc., Ry. Co. (Ohio)*, 279.

Discovery of plaintiff's peril by engineer in time to avoid collision was question for jury. *Baker v. Norfolk & S. R. Co. (N. Car.)*, 760.

Evidence.

Error to exclude testimony as to conversation between plaintiff and another, held a few minutes after plaintiff was injured, in which latter stated that driver of the wagon in which he was riding at time of accident said that he intended to drive to the crossing and stop there to "gentle" his horse. *Baker v. Norfolk & S. R. Co. (N. Car.)*, 760.

Gates.

Open gates are an invitation to cross, but they do not excuse a traveler from looking and listening for trains. *Shafer v. Lehigh Valley R. Co. (N. J.)*, 34.

Instruction covered proposition that willful negligence on part of deceased would be a defense to action for willful failure to give statutory signals at crossing. *Osteen v. Southern Ry. (S. Car.)*, 300.

Mutual rights and duties of trainmen of train standing at crossing and an ordinary highway traveler. *Williams v. Chicago, B. & Q. R. Co. (Neb.)*, 343.

Signals.

Comparative weight of positive and negative testimony as to whether crossing signals were given. *Winterbottom v. Philadelphia, etc., R. Co. (Pa.)*, 8.

Failure to give usual signal upon approaching station, which might have been heard at private crossing, was not negligence with respect to person injured at such crossing. *Annapolis, etc., Ry. Co. v. State (Md.)*, 733.

Lowering of gates does not excuse failure to give crossing signals. *Weaver v. Southern Ry. Co. (S. Car.)*, 749.

Negative testimony as proof that they were not given. *Schwarz v. Delaware, etc., R. Co. (Pa.)*, 10.

Negative testimony was sufficient to take issue to jury, although other witnesses testified that the train bell did ring. *Cotton v. Willmar, etc., Ry. Co. (Minn.)*, 501.

Negligence per se to back train on dark night over public crossing without giving signals. *Bowles v. Chesapeake & O. R. Co. (W. Va.)*, 309.

Private crossings. *Annapolis, etc., Ry. Co. v. State (Md.)*, 733.

Question for jury where positive and negative testimony on

CROSSINGS—Continued.

question whether signal were given. *Detroit So. R. Co. v. Lambert (C. C. A.)*, 771.

Questions for jury whether proper warning was given to one driving restive horse towards crossing. *Bickel v. Pennsylvania R. Co. (Pa.)*, 35.

Signals must be sufficient, under the circumstances, to give timely notice to highway travelers. *Bickel v. Pennsylvania R. Co. (Pa.)*, 35.

Though deceased was hard of hearing, it was proper to admit evidence that no signals were given. *Osteen v. Southern Ry. (S. Car.)*, 300.

Was not error to instruct jury to consider whether failure to give statutory signals was cause of accident though person injured saw train. *Osteen v. Southern Ry. (S. Car.)*, 300.

Signboards.

Application of certain Florida statute. *Seaboard Air Line Ry. v. Smith (Fla.)*, 793.

Speed.

Application of certain Florida statute limiting speed of trains at certain points. *Seaboard Air Line Ry. v. Smith (Fla.)*, 793.

Error to allow another teamster, as a witness, to state his opinion that there would have been no "unusual danger" in driving upon the track as deceased did if the train had been going at the usual rate of speed. *Detroit So. R. Co. v. Lambert (C. C. A.)*, 771.

In action for death sustained at railroad crossing, it was error to charge, in view of the evidence, that jury could find for plaintiff merely because the train was run at high speed. *Schwarz v. Delaware, etc., R. Co. (Pa.)*, 10.

Of from fifteen to twenty-five miles an hour around curve in track as negligence. *Serano v. New York Cent. & H. R. Co. (N. Y.)*, 293.

Where one about to cross a railroad track in an open country looks and listens, and no train is heard, and no signal given, the railroad company is liable if it runs its train at such a reckless rate of speed as would injure an unwarned traveler. *Schwarz v. Delaware, etc., R. Co. (Pa.)*, 10.

Stop, Look, and Listen.

Care required of deaf man. *Osteen v. Southern Ry. (S. Car.)*, 300.

Deceased's contributory negligence was question for jury. *Osteen v. Southern Ry. (S. Car.)*, 300.

Duty of traveler to alight from vehicle and walk to place where he can get good view up and down railroad track. *Manke-wicz v. Lehigh Valley R. Co. (Pa.)*, 509.

Fire engine drivers, care required of. *Thompson v. Pennsylvania R. Co. (Pa.)*, 695.

Obstructed view, effect of on care due from highway traveler and railroad. *Southern Ry. Co. v. Jones (Va.)*, 728.

Traveler's duty to continue to look until he has passed point of danger. *Choctaw, etc., R. Co. v. Baskins (Ark.)*, 431.

Where evidence showed that if plaintiff had continued in his course, he could have crossed the track with his wagon before car reached the point of crossing, but, having changed his mind, he attempted to back off; and that the motorman acted on the belief that he would succeed; and plaintiff acted on the same belief, he could not recover for his injuries sustained in the collision. *Baicker v. Peoples St. Ry. Co. (Pa.)*, 670.

CUSTOM AND USAGE.

See MASTER AND SERVANT.

DAMAGES.

See ACCIDENTS ON TRACK; CHILDREN; CROSSINGS; NEGLIGENCE; PERSONAL INJURIES; STREETS AND HIGHWAYS; TRESPASSERS.

Instruction that jury should award punitive damages in the event that it finds grounds therefor is erroneous. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

DEATH BY WRONGFUL ACT.

See CROSSINGS; EMPLOYERS' LIABILITY ACTS.

Damages.

Action under S. Car. Civ. Code 1902, §§ 2851, 2852, for wrongful death is a new cause of action, and authorizes exemplary damages where the death was result of willfulness or malice. *Osteen v. Southern Ry. (S. Car.)*, 300.

Children's loss of father's training. *St. Louis, etc., Ry. Co. v. Standifer* (Ark.), 377.

Excessive verdict. *Choctaw, etc., R. Co. v. Baskins* (Ark.), 431.

Life tables, instruction was not erroneous in stating that they placed life expectancy of deceased at so many years. *Northern Ala. Ry. Co. v. Key* (Ala.), 365.

Negligent breach of duty owing by defendant to deceased as proximate cause of death, necessity of alleging in complaint. *Norfolk & W. Ry. Co. v. Stegall's Adm'x* (Va.), 664.

Presumption of due care on part of deceased, effect of as affected by testimony of eyewitnesses. *Savage v. Rhode Island Co. (R. I.)*, 206.

Presumption that person killed at crossing looked and listened for trains, whether overcome by engineer's testimony. *Schwarz v. Delaware, etc., R. Co. (Pa.)*, 10.

DELAY.

See CARRIERS; BILLS OF LADING.

DEMURRAGE.

See COMMON CARRIERS; RAILROAD COMMISSIONS.

DOGS.

See ANIMALS.

EMINENT DOMAIN.

See RAILROADS; RAILROADS IN STREETS.

Fact that predecessor of consolidated railroad company had appropriated land for an easement or fill on certain premises did not debar consolidated company from appropriating additional lands for purpose of raising such embankment. *Smith v. Cleveland, etc., Ry. Co. (Ind.)*, 406.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS.

Application of Alabama statute making employer's liable for injury to servants negligently caused by any person in master's service having superintendence, control, etc. *Southern Ry. Co. v. Shook* (Ala.), 371.

Hospital and relief department maintained by railroad for benefit of injured employees was not within certain statute. *Harrison v. Alabama Mid. Ry. Co. (Ala.)*, 511.

N. Car. Revisal 1905, § 2646, is applicable to corporation operating railroad for transportation of logs. *Liles v. Fosburg Lumber Co. (N. Car.)*, 517.

Sufficiency of complaint under statute of Alabama making employers liable for injuries to servants caused by any person in mas-

EMPLOYERS' LIABILITY ACTS—Continued.

- ter's service having superintendence, control, etc. *Southern Ry. Co. v. Shook* (Ala.), 371.
- Under certain Texas statute, it is not essential to liability that death should result from an act intentionally done; and, if the servant negligently does an act with no purpose of inflicting injury, but it proximately causes death, the employer railroad may be liable. *Galveston, etc., Ry. Co. v. Currie* (Tex.), 538.
- Validity of 34 Fed. Stat. at L., 232, chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891. *Howard v. Illinois Cent. R. Co.* (U. S.), 437.

EVIDENCE.

See **BILLS OF LADING; CARRIERS; CROSSINGS; FIRES SET BY LOCOMOTIVES; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; PERSONAL INJURIES; STOCK, INJURIES TO; TRESPASSERS.**

Defendant was not prejudiced by the refusal to admit evidence of predictions of by-standers who were present when accident occurred. *St. Louis, etc., Ry. Co. v. Neal* (Ark.), 712.

Opinion Evidence.

- Harmless error in refusing to strike out opinion of witness that car was moving at "an unpardonable high rate of speed." *Kline v. Santa Barbara Consol. Ry. Co.* (Cal.), 41.
- Speed of street car. *Coffey v. Omaha, etc., Ry. Co.* (Neb.), 599.
- Speed of train. *Seaboard Air Line Ry. v. Smith* (Fla.), 793.
- Train dispatcher's record as evidence as to whether train was at or near certain part of railroad's system at certain time. *Louisville & N. R. Co. v. Daniel* (Ky.), 493.

FELLOW SERVANTS.

- Employee charged with duty of inspecting and repairing cars was fellow servant of brakeman. *Snellen v. Kansas City So. Ry. Co.* (Ark.), 110.
- Foreman and employee under his orders. *Owens v. San Pedro, etc., R. Co.* (Utah), 373.
- Men engaged in construction of railroad tracks and motorman. *Kilduff v. Boston Elev. Ry. Co.* (Mass.), 166.
- Motorman and conductor of one street car are fellow servants of those of another car. *Berg v. Seattle, R. & S. Ry. Co.* (Wash.), 549.
- Power of Congress to render fellow-servant doctrine inapplicable to an action against an interstate carrier for injuries sustained by one of its employees engaged in interstate commerce. *Howard v. Illinois Cent. R. Co.* (U. S.), 437.
- Workman excavating roadbed of railway injured by explosion of dynamite, caused by negligence of employee helping him in lighting fuses, could not recover against railroad. *Vito v. West Chester, etc., Ry. Co.* (Pa.), 370.

FENCES.

See **STOCK, INJURIES TO.**

FIRES.

See **NEGLIGENCE.**

FIRES SET BY LOCOMOTIVES.

Customary speed of passenger trains, duty to diminish on dry and windy days. *Woodward v. Chicago, etc., Ry. Co.* (C. C. A.), 673.

Evidence.

Condition of locomotive during preceding month not too remote. *Woodward v. Chicago, etc., Ry. Co.* (C. C. A.), 673.

Of railroad's requirement or custom as to inspection of loco-

FIRES SET BY LOCOMOTIVES—Continued.

motives was competent upon issue of negligence. *Woodward v. Chicago, etc., Ry. Co. (C. C. A.)*, 673.

Presumption of negligence from setting fire created by certain Minnesota statute, effect of. *Woodward v. Chicago, etc., Ry. Co. (C. C. A.)*, 673.

Rebuttal of presumption of negligence created by certain Minnesota statute, so that verdict should be directed for defendant. *Woodward v. Chicago, etc., Ry. Co. (C. C. A.)*, 673.

FOREIGN CORPORATIONS.

Doing business within state, certain soliciting of freight and passenger traffic was not. *Green v. Chicago, B. & Q. Ry. Co. (U. S.)* 194.

Doing business within state, effect of fact that foreign railroad company owned controlling interest in stock of domestic railroad company. *Peterson v. Chicago, etc., R. Co. (U. S.)*, 247.

FRIGHTENING TEAMS.

See CROSSINGS.

Actionable negligence to turn on steam of locomotive at street crossing without warning and without looking out for teams. *Williams v. Chicago, B. & Q. Ry. Co. (Neb.)*, 343.

Liability on account of noises incident to ordinary operation of train. *Williams v. Chicago, B. & Q. Ry. Co. (Neb.)*, 343.

Noises incident to ordinary operation of train, duty to temporarily suspend. *Williams v. Chicago, B. & Q. Ry. Co. (Neb.)*, 343.

HABITS.

See DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

HOSPITALS.

See MASTER AND SERVANT.

IMPUTED NEGLIGENCE.

See CHILDREN.

Livery team's driver's negligence in failing to take proper precautions at railroad crossing was not imputable to his passenger. *Cotton v. Willmar, etc., Ry. Co. (Minn.)*, 501.

Negligence of minor driver of vehicle belonging to his father, in approaching crossing, cannot be imputed to one riding with him as his guest. *Baker v. Norfolk & S. R. Co. (N. Car.)*, 760.

Person injured through negligence of third person and concurring negligence of one with whom she was riding as guest, whether chargeable with driver's negligence. *Shultz v. Old Colony St. Ry. (Mass.)*, 782.

Where fireman riding on fire engine knew that no stop would be made at railroad crossing by driver of fire engine, he assumed the risk. *Thompson v. Pennsylvania R. Co. (Pa.)*, 695.

Burden was upon railroad to show that injuries to property were done by an independent contractor for whose conduct it was not responsible. *St. Louis, etc., Ry. Co. v. Davenport (Ark.)*, 516.

INJUNCTION.

See STREET RAILWAYS.

INJURIES TO PROPERTY.

See NEGLIGENCE.

INSTRUCTIONS.

See CARRIERS OF PASSENGERS; DAMAGES; MASTER AND SERVANT; NEGLIGENCE.

INTERSTATE COMMERCE.

See EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; INTOXICATING LIQUORS.

Carrier, by engaging in interstate commerce, does not thereby submit all its business affairs to the regulating power of Congress. *Howard v. Illinois Cent. R. Co. (U. S.)*, 437.

Constitutionality of Act Cong. March 28, 1893, requiring American Railway Association to designate to Interstate Commerce Commission the standard height of drawbars for freight cars, etc. *St. Louis, etc., Ry. Co. v. Neal (Ark.)*, 712.

Judicial enforcement of order of Interstate Commerce Commission. *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission (U. S.)*, 94.

Power of interstate commerce commission to investigate complaint as to freight rates. *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission (U. S.)*, 94.

Powers of Interstate Commerce Commission. *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission (U. S.)*, 94.

State Interference.

Maryland Acts 1906, p. 413, c. 257, amending charter of certain railroad so as to prohibit it from allowing its tracks to connect with certain other railroad, except under certain arrangement as to freight charges, is invalid as an attempt to regulate interstate commerce. *State v. Cumberland & P. R. Co. (Md.)*, 122.

Unlawful discrimination with respect to classification for purpose of fixing freight rates. *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission (U. S.)*, 94.

INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE.

INTERSTATE PASSENGERS.

See CARRIERS OF PASSENGERS.

INTOXICATING LIQUORS.

Effect of agreement of local express agent to hold for a few days a C. O. D. interstate shipment of intoxicating liquors on character of the transaction as interstate commerce. *Adams Express Co. v. Kentucky (U. S.)*, 132.

Materiality in criminal prosecution of fact that express company knew that a C. O. D. interstate shipment was not ordered by consignee. *Adams Express Co. v. Kentucky (U. S.)*, 132.

JOINDER.

See BAGGAGE.

JOINT LIABILITY.

See STATIONS AND DEPOTS.

JUDICIAL NOTICE.

That train going at rate of 20 to 25 miles an hour can be stopped within 80 or 90 yards. *Southern Ry. Co. v. Gullatt (Ala.)*, 336.

JURORS.

Citizens of county, by reason of that fact alone, are not disqualified to serve as jurors in action by county to recover damages against railroad for destruction of public highway. *Big Sandy Ry. Co. v. Floyd County (Ky.)*, 424.

LICENSEES.

See CHILDREN; CROSSINGS; TRESPASSERS.

Boy sent by his father to deliver package to passenger on train, which was expected to stop at station, was entitled to be pro-

LICENSEES—Continued.

ected by exercise of ordinary care by railroad. *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 487.

Contributory Negligence.

Care required of licensees while walking along railroad track. *Teakle v. San Pedro, etc., R. Co.* (Utah), 18.

Rights and duties of people having business with passenger train stopped where tracks are between it and depot platform. *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 487.

Duty to keep car in safe condition for use of consignee's employees in removing shipment. *Ladd v. New York, etc., R. Co.* (Mass.), 709.

Evidence.

Distance within which train might have been stopped after intestate was struck, evidence of was admissible for certain reasons. *Teakle v. San Pedro, etc., R. Co.* (Utah), 18.

Harmless error in permitting plaintiff to be asked whether he could have got across track when he started across before train got there, if his foot had not caught. *Pittsburg, etc., Ry. Co. v. Simons* (Ind.), 283.

Lookouts.

Defendant, being bound to observe a lookout for licensees on the track, was also bound to provide for the exchange of signals between the brakeman and engineer in question, and the doctrine of last clear chance was applicable, though the engineer had no actual knowledge of intestate's peril. *Teakle v. San Pedro, etc., R. Co.* (Utah), 18.

Duties of trainmen to licensees on railroad track in city. *Teakle v. San Pedro, etc., R. Co.* (Utah), 18.

Railroad does not owe duty of prevision to bare licensee on its tracks, nor does it owe him the duty of employing competent servants to manage its trains, or to run them in any particular manner, or at a particular rate of speed. *Norfolk, etc., Ry. Co. v. Stegall's Adm'x* (Va.), 664.

Negligence in backing train across trestle, without lookout on end of cars, at speed in violation of ordinance, sufficiency of complaint in action for death of bare licensee. *Norfolk, etc., Ry. Co. v. Stegall's Adm'x* (Va.), 664.

Negligence to permit another train to pass between standing passenger train and depot at high speed while business is being rightfully transacted with the passenger train. *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 487.

Railroad was not relieved from liability for injury to consignee's employee merely because his employer put him to work about the car in question knowing of its defect, such employer having drawn railroad's attention to it. *Ladd v. New York, etc., R. Co.* (Mass.), 709.

Where railroad, before moving car, notified one engaged in unloading it to get off it, but he did not, the railroad is not liable for resulting injury to him. *Louisville & N. R. Co. v. Farris* (Ky.), 347.

Who Are.

Persons walking on track at certain point in city. *Teakle v. San Pedro, etc., R. Co.* (Utah), 18.

Person who went on car left on siding to help unload it was not a trespasser, and was entitled to recover for injury sustained by reason of latent defect which resulted in uncoupling of the cars. *Louisville & N. R. Co. v. Farris* (Ky.), 347.

Whether person struck by train while crossing track was a licensee was question for jury. *Pittsburg, etc., Ry. Co. v. Simons* (Ind.), 283.

LIENS.

See COMMON CARRIERS.

LIFE TABLES.

See DEATH BY WRONGFUL ACT.

LIMITATIONS OF ACTIONS.

See COMMON CARRIERS; NUISANCES.

LIMITING LIABILITY.

See CARRIERS.

LIVERY TEAMS.

See CROSSINGS; IMPUTED NEGLIGENCE.

LOGGING RAILROADS.

See EMPLOYEES' LIABILITY ACTS.

MALICIOUS PROSECUTION.

Street railroad's liability for malicious prosecution instituted by its superintendent. *Canon v. Sharon, etc., Ry. Co. (Pa.)*, 379.

MASTER AND SERVANT.

See EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS'; TICKETS AND FARES.

Appliances.

Care requiring of railroad in furnishing ladder for use of fireman in climbing locomotive. *McDonnell v. New York, etc., R. R. (Mass.)*, 525.

Degree of care required of master in selecting handle for hand car. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Facts in question were insufficient to establish negligence of railroad in furnishing its injured employee with unsafe car ladder. *McDonnell v. New York, etc., R. R. (Mass.)*, 525.

Instruction that there was no implied warranty on part of master that appliances furnished servant were sound and fit for use was properly refused. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Negligence of street railway in failing to furnish sufficient block-light system, so as to be liable for injury to motorman from collision with another car. *Berg v. Seattle, R. & S. Ry. Co. (Wash.)*, 549.

Assumption of Risk.

Knowledge of servant of defect in appliance may have failed to apprise him that it was dangerous to use it. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Liability of lime to explode when mixed with water is a matter of common knowledge, the risk of which a servant assumes, when mixing them, without special warning or inspection. *Bollington v. Louisville & N. R. Co. (Ky.)*, 350.

Plea was bad on demurrer because it failed to state that injured servant knew or appreciated the risks from defects in machinery of which he had knowledge. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Servant not bound to give notice to master of defective appliances, where latter knew of such defects. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Servant's knowledge of kind of wood used in making handle of hand car, by reason of the breaking of which he was injured. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Where master knows of defect in his machinery, his servant does not assume risk connected therewith by failing to give him notice of same although he may not know that the master knew of the defect. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

MASTER AND SERVANT—Continued.**Contributory Negligence.**

Act of engineer in placing ladder against boiler of locomotive before directing the fireman to ascend it was not an act of superintendence, relieving plaintiff from inspecting security of the ladder before attempting to ascend it. *McDonnell v. New York, etc., R. R. (Mass.)*, 525.

Attempting to couple defective cars under direct orders of superior. *Liles v. Fosburg Lumber Co. (N. Car.)*, 517.

Choosing more dangerous way of working hand car. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Duty of injured servant to have the defective appliance examined. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Duty of servant to take precautions against known dangers, where such conduct would be incompatible with the discharge of his duties. *Northern Alabama Ry. Co. v. Key (Ala.)*, 365.

Failure to show freedom from contributory negligence in action for death of street railway conductor. *Savage v. Rhode Island Co. (R. I.)*, 206.

Master's plea that its servant contributed to his injury by failing to choose safe work place, but which does not charge that a safe place was apparent or known to him, was bad on demurrer. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Of car repairer in attempting to repair car without permission of foreman, and without displaying flag. *Snellen v. Kansas City S. Ry. Co. (Ark.)*, 110.

Of servant in occupying certain position on hand car when he fell because of defect in handle of car. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Right of servant to assume that handle of master's hand car was in safe condition. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Right of servant to assume that locomotive would not be moved until signal required by rules of his railroad had been given. *Northern Alabama Ry. Co. v. Key (Ala.)*, 365.

Servant was not guilty of in failing to signal hostler in charge of locomotive to stop it, where it was already standing still, as required by a rule of the railroad. *Northern Ala. Ry. Co. v. Key (Ala.)*, 365.

That employee had been generally instructed by an assistant to defendant's general superintendent not to couple cars did not relieve him of duty of obeying express order given by the superintendent to couple certain cars at time of his injury. *Liles v. Fosburg Lumber Co. (N. Car.)*, 517.

Where engineer placed ladder against locomotive's boiler and directed its fireman, to "go up there and shut off the steam," such statement did not relieve fireman from duty of seeing whether ladder was safely placed. *McDonnell v. New York, etc., R. R. (Mass.)*, 525.

Evidence.

As to whether servant would have been injured if he had been standing in different position on hand car. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Opinion evidence as to whether a buffer at end of spur track was a reasonably proper one. *Gila Valley, G. & N. R. Co. v. Lyon (U. S.)*, 776.

Opinion evidence as to whether proper care had been exercised in so building overhead structure as to prevent use of hand brakes on freight car until about 100 feet from end of spur track. *Gila Valley, G. & N. R. Co. v. Lyon (U. S.)*, 776.

Speed of the car, evidence of was not evidence of negligence of railway in action for death of its conductor, struck by pole near track, where such speed was subject to the conductor's control. *Savage v. Rhode Island Co. (R. I.)*, 206.

MASTER AND SERVANT—Continued.

- That handles of other wood could as easily have been put in, in action for personal injury to servant from breaking of handle of hand car. *Southern Ry. Co. v. McGowan* (Ala.), 353.
- Negligence in backing engine over servant as affected by knowledge of his position. *Northern Ala. Ry. Co. v. Key* (Ala.), 365.
- Prima facie case of negligence of railroad, under certain statute requiring lookout to be kept on trains, where defendant's brakeman was killed by passenger train while operating hand car. *St. Louis, etc., Ry. Co. v. Standifer* (Ark.), 377.
- Proximate cause where defect in coupling of flat car loaded with logs caused it to come unusually close to another car before striking it, and plaintiff was crushed, while attempting to make the coupling under express orders of his superintendent. *Liles v. Fosburg Lumber Co.* (N. Car.), 517.

Release.

- Servant cannot attack settlement for his personal injuries as fraudulent without offering to return sum paid by his master. *Harrison v. Alabama Mid. Ry. Co.* (Ala.), 511.

Relief Department.

- Ultra vires, act of railroad in assisting to organize and maintain relief and hospital department for benefit of its injured employees was not. *Harrison v. Alabama Mid. Ry. Co.* (Ala.), 511.

Rules.

- Certain rule was for protection of the railroad's employees, as well as others. *Northern Ala. Ry. Co. v. Key* (Ala.), 365.
- Duty to promulgate rule made for protection of employees and others. *Northern Ala. Ry. Co. v. Key* (Ala.), 365.
- Nonexistence of rule, evidence of violation of alleged rule by other servants to show. *Southern Ry. Co. v. McGowan* (Ala.), 353.
- When contents of may be shown by testimony of witness being examined. *Northern Ala. Ry. Co. v. Key* (Ala.), 365.

Safe Work Place.

- Complaint charging employer railroad's failure to provide deceased employee with safe work place was demurrable, there being nothing in the complaint indicating his death was due to any other cause than the moving of the train while he was between it and a box car on a side track, where he was engaged in transferring baggage. *Southern Ry. Co. v. Shook* (Ala.), 371.

Scope of Employment.

- Act of roundhouse employee, while using compressed air in line of his duty, in turning it on subordinate in sport, causing his death. *Galveston, etc., Ry. Co. v. Currie* (Tex.), 538.
- Superintendent's conduct, in addition to stating that he did wish not to employ plaintiff to work for defendant railroad, in slandering him in regard to his former work for the railroad, was not within such officer's implied authority, so as to render railroad liable for such slander. *Sawyer v. Norfolk & S. R. Co.* (N. Car.), 530.

Warn and Instruct.

- Alighting from moving train upon pile of gravel, danger of was obvious, and railroad was not negligent in failing to warn brakeman of such danger. *Louisiana & A. R. Co. v. Miles* (Ark.), 475.
- Duty to warn street car conductor of non-obvious danger from pole near track. *Savage v. Rhode Island Co.* (R. I.), 206.

Who Are Employees.

- Fact that carrier several months after plaintiff was injured is-

MASTER AND SERVANT—Continued.

sued him a pass to enable him to return to his home, in which he was described as an "injured employee," was not admissible to show a ratification of defendant's conductor's attempt to employ him on freight train. *Vassor v. Atlantic Coast Line R. Co. (N. Car.)*, 629.

Person permitted by conductor, without authority, to work his passage on freight train. *Vassor v. Atlantic Coast Line R. Co. (N. Car.)*, 629.

NEGLIGENCE.

See ANIMALS; BAGGAGE; BRIDGES; CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; EVIDENCE; FELLOW SERVANTS; FRIGHTENING TEAMS; MASTER AND SERVANT; RAILROADS IN STREETS; STATIONS AND DEPOTS; STOCK, INJURIES TO; TRESPASSERS; WATER AND WATERCOURSES.

Burden of proof, instruction as to was subject to criticism as tending to make jury believe that something more than weight of evidence or preponderance of probability was required. *Hutson v. Southern Cal. Ry. Co. (Cal.)*, 315.

Damages.

Constitutionality of statute allowing punitive damages for negligence of railroads. *Osteen v. Southern Ry. (S. Car.)*, 300.

Discovered Peril.

Negligence in failing to discover perilous situation of another, definition of. *Teakle v. San Pedro, etc., R. Co. (Utah)*, 18.

Fire started through negligence of railroad's employees in burning right of way, railroad liable for destruction of building by, though, because of direction of the wind, the fire was burning towards the track. *Missouri, etc., Ry. Co. v. Fithian (Kan.)*, 699.

"Last chance" doctrine, when not applicable. *Drown v. Northern Ohio Traction Co. (Ohio)*, 1.

Pleading.

Duty owed by defendant to plaintiff and its breach, necessity of alleging in complaint. *Norfolk, etc., Ry. Co. v. Stegall's Adm'x (Va.)*, 664.

Inconsistent allegations of. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

"Last chance" rule, necessity of alleging its application in petition. *Drown v. Northern Ohio Traction Co. (Ohio)*, 1.

Several acts of same nature may be pleaded in one count. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

Presumption that defendant railroad was negligent is created by proof that plaintiff was injured by the running of one of defendant's street cars. *Gainesville & D. Elec. Ry. Co. v. Austin (Ga.)*, 704.

Proximate Cause.

Definition. *Florida, etc., Ry. Co. v. Wade (Fla.)*, 611.

Error in instruction, in using "sole cause" as synonymous with "proximate cause" was cured by other instructions. *Gila Valley, G. & N. R. Co. v. Lyon (U. S.)*, 776.

Instruction invading province of jury. *Southern Ry. Co. v. McGowan (Ala.)*, 353.

Where railroad permitted its cars to run off spur track and knock down fence of adjoining owners, it was liable for injuries to fence. *Thomason v. Seaboard Air Line Ry. (N. Car.)*, 385.

NUISANCES.

See RAILROADS IN STREETS.

Citizen's right to recover damages where freight depot in town con-

NUISANCES—Continued.

- stituted public nuisance. *City of Hickory v. Southern Ry. Co.* (N. Car.), 381.
- Construction and use of track outside of right of way near dwelling constituted a private nuisance for which railroad was liable. *Thomason v. Seaboard Air Line Ry.* (N. Car.), 385.
- Freight depot in town as public nuisance. *City of Hickory v. Southern Ry. Co.* (N. Car.), 381.
- Limitation of action against railroad for maintaining water tank as a nuisance. *Texas & Pac. Ry. Co. v. Edrington* (Tex.), 168.
- Side tracks used for regular traffic and for storing locomotives used on branch line. *Thomason v. Seaboard Air Line Ry.* (N. Car.), 396.
- Town proper party to sue when railroad's freight depot constituted public nuisance. *City of Hickory v. Southern Ry. Co.* (N. Car.), 381.

ORDINANCES.

See CROSSINGS; NEGLIGENCE.

PARTIES.

See COMMON CARRIERS.

PENAL STATUTES.

See COMMON CARRIERS; NUISANCES.

PENS.

See CARRIERS OF LIVE STOCK.

PERSONAL INJURIES.

- See CARRIERS OF PASSENGERS; CROSSINGS; NEGLIGENCE; STATIONS AND DEPOTS; TRESPASSERS.
- Burden of proving existence of injury and absence of negligence, under c. 4071, p. 113, Fla. Laws of 1891. *Seaboard Air Line Ry. v. Smith* (Fla.), 793.

Damages.

- General rule as to measure of. *Southern Ry. Co. v. McGowan* (Ala.), 353.
- Hire of nurse. *Kline v. Santa Barbara Consol. Ry. Co.* (Cal.), 41.
- Instruction was erroneous, as jury should have been confined to such sum as would fairly compensate plaintiff for value of time lost, reasonable expenses incurred, physical and mental suffering caused by her injury, and for any loss of earning capacity. *Lexington Ry. Co. v. Herring* (Ky.), 635.
- Verdict was not excessive. *Gainesville & D. Elec. Ry. Co. v. Austin* (Ga.), 704.
- \$2,250 was not excessive. *Louisville & E. R. Co. v. Vincent* (Ky.), 567.

Evidence.

- Habits of industry and sobriety of plaintiff, admissibility of evidence of. *Louisville & N. R. Co. v. Daniel* (Ky.), 493.
- Harmless error in admitting evidence as to extent and permanence of plaintiff's injuries. *Kline v. Santa Barbara Consol. Ry. Co.* (Cal.), 41.
- Plaintiff's moral character not admissible, except as impeaching evidence or in rebuttal to such. *Louisville & N. R. Co. v. Daniel* (Ky.), 493.
- Testimony of anyone of ordinary intelligence and experience as to the suffering of an injured person is competent. *Kline v. Santa Barbara Consol. Ry. Co.* (Cal.), 41.

PLEADING.

See BAGGAGE; CROSSINGS; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; NEGLIGENCE.

PRESUMPTIONS.

See BAGGAGE; BILLS OF LADING; CARRIERS; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; NEGLIGENCE; STOCK, INJURIES TO.

PROCESS.

See FOREIGN CORPORATIONS.

PROXIMATE CAUSE.

See CARRIERS; CROSSINGS; NEGLIGENCE.

RAILROAD COMMISSIONS.

See INTERSTATE COMMERCE.

Mississippi railroad commission had power to make rules as to reciprocal demurrage; and certain rule providing that when cars are properly loaded and shipping instructions given, the railroad agent must immediately issue bills of lading therefor, and that if a car or cars are held, and not carried within 24 hours thereafter, the railroad shall be liable to shipper for payment of one dollar for each day or fraction of a day the car or cars shall be detained was within its authority. *Yazoo & M. V. R. Co. v. Keystone Lumber Co.* (Mass.), 113.

RAILROADS.

See BRIDGES; CARRIERS; CROSSINGS; FOREIGN CORPORATIONS; JUDICIAL NOTICE; JURORS; MALICIOUS PROSECUTION; NEGLIGENCE; NUISANCES; RIGHT OF WAY; STREET RAILWAYS; STREETS AND HIGHWAYS; TAXATION.

Consolidated railroad's corporate existence was so far de jure as to repel collateral attack by defendant in condemnation proceedings. *Smith v. Cleveland, etc., Ry. Co.* (Ind.), 406.

Consolidation of railroads, application of certain statutes. *Smith v. Cleveland, etc., Ry. Co.* (Ind.), 406.

Consolidation of railroads, effect of on citizenship. *Smith v. Cleveland, etc., Ry. Co.* (Ind.), 406.

Consolidation of railroads, effect of on powers, rights, obligations, etc. *Smith v. Cleveland, etc., Ry. Co.* (Ind.), 406.

Consolidation of railroads, effect of on right to exercise power of eminent domain. *Smith v. Cleveland, etc., Ry. Co.* (Ind.), 406.

Power to consolidate. *Smith v. Cleveland, etc., Ry. Co.* (Ind.), 406.

RAILROADS IN STREETS.

See NEGLIGENCE; NUISANCES.

Abutting owner's rights as affected by fact that railroad company owning short line has consolidated with other companies so as to form through line. *Thomason v. Seaboard Air Line Ry.* (N. Car.), 396.

Contributory Negligence.

Driver of wagon's knowledge that he was liable to encounter train in street where he was injured by it and that street was so narrow that he could not pass a train with his wagon. *Haley v. Missouri Pac. Ry. Co.* (Mo.), 683.

Damages.

Injury to furniture of adjoining owners from smoke and cinders caused to pass through house by negligent operations on spur track. *Thomason v. Seaboard Air Line Ry.* (N. Car.), 385.

Lookout, evidence to show necessity of increased diligence in keeping when cars were being pushed or backed along track at certain place. *St. Louis, etc., Ry. Co. v. Sparks* (Ark.), 739.

Right of railroad to elevate or depress its tracks within city limits. *City of Chester v. Baltimore & O. R. Co.* (Pa.), 177.

RAILROADS IN STREETS—Continued.

Right of railroad to occupy or cross streets. *City of Chester v. Baltimore & O. R. Co. (Pa.)*, 177.

Speed of train, grade of street as justification for. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

Speed of train of 20 miles an hour, question for jury whether negligent. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

Speed of train, railroad is not liable to one injured for failing to stop train after discovering his peril, if, in fact, it was such that engineer could not stop train. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

Speed of trains as negligence. *Seaboard Air Line Ry. v. Smith (Fla.)*, 793.

Speed of trains as negligence, question for jury in absence of regulating statute or ordinance. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

Speed of trains, authority of city to pass ordinance limiting. *Seaboard Air Line Ry. v. Smith (Fla.)*, 793.

Speed of trains, common-law duty to regulate. *Haley v. Missouri Pac. Ry. Co. (Mo.)*, 683.

RELEASE.

See MASTER AND SERVANT.

RELIEF DEPARTMENT.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANTS.

REMEDIES.

See COMMON CARRIERS.

RES GESTÆ.

See MASTER AND SERVANT.

RIGHT OF WAY.

Railroad was liable in trover to owner of land on account of sand excavated by it from right of way and sold. *Nashville, etc., Ry. Co. v. Karthaus (Ala.)*, 201.

Right of railroad to excavate sand from right of way and sell it. *Nashville, etc., Ry. Co. v. Karthaus (Ala.)*, 201.

SLANDER.

See MASTER AND SERVANT.

SLEEPING CAR COMPANIES.

See BAGGAGE; CARRIERS OF PASSENGERS.

SPEED.

See EVIDENCE; FIRES SET BY LOCOMOTIVES; RAILROADS IN STREETS.

STATIONS AND DEPOTS.

See LICENSES; NUISANCES; STOCK, INJURIES TO.

Extent of depot grounds. *Wilmot v. Oregon R. Co. (Ore.)*, 339.

Extent of depot grounds, evidence of. *Wilmot v. Oregon R. Co. (Ore.)*, 339.

Joint liability where negligence was shown on part of those operating the train inflicting the injury sued for, which was made up of cars belonging to one company, propelled by an engine of another, operated by a crew paid by the third, and it appeared that the depot, at which the accident occurred, was maintained for common benefit of the three companies. *Brown v. Southern Pac. Co. (Utah)*, 744.

STATIONS AND DEPOTS—Continued.

Passengers injured through negligence of newspaper reporter in moving truck along station platform with carrier's consent, liability of carrier. *Mangum v. North Carolina R. Co. (N. Car.)*, 596.

STOCK, INJURIES TO.

See ANIMALS; BRIDGES.

Contributory Negligence.

Effect of in action based on Md. Code Pub. Gen. Laws, art. 23, § 287. *Norfolk & W. Ry. Co. v. Smith (Md.)*, 696.

Horse negligently cared for permitted to stray on railroad track. *Norfolk & W. Ry. Co. v. Smith (Md.)*, 696.

Turning horses out to graze on unenclosed lands near depot. *Wilmot v. Oregon R. Co. (Ore.)*, 339.

Failure of engineer to check speed of train until plaintiff's cattle were struck did not, under the circumstances, constitute negligence. *Chicago, etc., Ry. Co. v. Ramsey (Ind.)*, 274.

Headlight's bad condition was cause of engineer's failure to see the horses, if he was keeping a lookout, in time to avoid a collision. *Jonesboro, etc., R. Co. v. Guest (Ark.)*, 768.

Injury to cattle negligently permitted to stray on track, liability of railroad. *Cumming v. Great Northern Ry. Co. (N. Dak.)*, 672.

Instruction was erroneous which made question of negligence depend upon whether engineer and fireman "in good faith" exercised the best judgment they could under the circumstances. *Arkansas & L. Ry. Co. v. Sanders (Ark.)*, 765.

Lookout, duty of trainmen to keep. *Arkansas & L. Ry. Co. v. Sanders (Ark.)*, 765.

Lookout for stock on track, duty of engineer and liability of railroad for failure to maintain. *Stading v. Chicago, etc., Ry. Co. (Neb.)*, 270.

Lookout, sufficiency of evidence of failure of trainmen to keep. *Arkansas & L. Ry. Co. v. Sanders (Ark.)*, 765.

Negligence in running train against horse was question for jury. *Arkansas & L. Ry. Co. v. Sanders (Ark.)*, 765.

Negligence of railroad in killing animals on its track must be shown in order to render it liable. *Atchison, etc., Ry. Co. v. Adcock (Colo.)*, 769.

One cause of action for killing one steer and mortally wounding another, by running the same locomotive against them, both being struck within a few seconds of the same time. *Chicago, etc., Ry. Co. v. Ramsey (Ind.)*, 274.

Oregon, B. & C. Comp. St. § 5139, making railroads liable for stock killed on unfenced tracks, is not applicable to depot grounds. *Wilmot v. Oregon R. Co. (Ore.)*, 339.

Presumption of negligence does not arise against railroad from mere fact that animals are killed by its train. *Atchison, etc., Ry. Co. v. Adcock (Colo.)*, 769.

Presumption of negligence does not arise as against the licensee railroad from the fact that a horse was found injured near the track; in an action for the killing of a horse, alleged to be caused by the operation of a train running by permission over the track of another railroad company. *St. Louis S. W. Ry. Co. v. Heintz (Ark.)*, 32.

Prima facie case of negligence against railroad created by proof of killing of horse by train. *Arkansas & L. Ry. Co. v. Sanders (Ark.)*, 765.

Railroad was liable for killing of horses in question, where if the engine headlight had been in good condition, the engineer could have seen the horses in time to have avoided killing them, if he had been keeping lookout. *Jonesboro, etc., R. Co. v. Guest (Ark.)*, 768.

STOCK, INJURIES TO—Continued.

Since Burns' Ann. St. 1901, § 5322, exempting railroads from liability where stock enters at private crossing, "unless caused by the negligence * * * of the company," does not define what shall constitute negligence, it must be determined by the rules of common law. *Chicago, etc., Ry. Co. v. Ramsey* (Ind.), 274.

Where plaintiff's animals entered on railroad right of way where the railroad had failed to maintain fence, though it should have done so, and, leaving it, crossed lands of another, and again entered upon the right of way through private gate, where they were killed, the two entries were separate and distinct, and the railroad was not liable under Burns, Ann. St. 1901, § 5321. *Chicago, etc., Ry. Co. v. Ramsey* (Ind.), 274.

Whether railroad is required by certain statute, making it liable for killing stock on unfenced track, to fence its depot grounds is a question of law for the court. *Wilmot v. Oregon R. Co.* (Ore.), 339.

STREET RAILWAYS.

See ANIMALS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; MASTER AND SERVANT; NEGLIGENCE; TICKETS AND FARES.

Burden of proof imposed upon city in action to recover against railway cost of paving portion of street. *City of Reading v. United Traction Co.* (Pa.), 420.

Certain bridges were parts, respectively, of the two streets, within meaning of the word "streets" as used in ordinances imposing on owners of the street railways the duty to repair them. *Northern Cent. Ry. Co. v. United Rys. & Elec. Co.* (Md.), 184.

Common law duty of railway to keep street in good condition. *City of Reading v. United Traction Co.* (Pa.), 420.

Injunction will not lie to require railway to restore way which it has excavated to its previous condition, where it will subject company to great inconvenience and plaintiff has unreasonably delayed enforcement of his rights. *Levi v. Worcester Consol. St. Ry.* (Mass.), 491.

Railroad was entitled to recover from street railway succeeding to rights and obligations of certain original companies that portion of cost of repairing bridges for which the street railway company would have been liable had the bridges been repaired by the city. *Northern Cent. R. Co. v. United Rys. & Elec. Co.* (Md.), 184.

Suburban railway's failure to provide its cars with water tanks and toilet rooms warranted finding that the cars were not supplied with suitable appliances. *West Bloomfield Tp. v. Detroit United Ry. Co.* (Mich.), 605.

STREETS AND HIGHWAYS.

See RAILROADS IN STREETS.

Damages.

Inconvenience or injury to traveling public by reason of destruction of highway by railroad company cannot be considered in estimating damages sustained by the county. *Big Sandy Ry. Co. v. Floyd County* (Ky.), 424.

Intention of railroad to dedicate street, sufficiency of evidence of. *Railroad Co. v. Village of Roseville* (Ohio), 173.

Presumption that user was permissive where railroad maintained a way or street over its tracks and uninclosed land. *Railroad Co. v. Village of Roseville* (Ohio), 173.

TAXATION.

Ordinance taxing warehousemen is not applicable to commercial railroad which maintains warehouse as incident to its freight

TAXATION—Continued.

business. *Town of Arlington v. Central of Georgia Ry. Co.* (Ga.), 197.

When municipality is prohibited by law from taxing general business of railroad as a common carrier, it cannot segregate from such business a necessary incident and classify it as an occupation and tax it as such. *Town of Arlington v. Central of Georgia Ry. Co.* (Ga.), 197.

TICKETS AND FARES.

See CARRIERS OF PASSENGERS.

Certain provision of street railway franchise included passenger rate between certain points on any line subsequently built or purchased by defendant corporation. *West Bloomfield Tp. v. Detroit United R. Co.* (Mich.), 605.

Compliance with franchise requiring street railway to sell "family tickets." *West Bloomfield Tp. v. Detroit United Ry. Co.* (Mich.), 605.

Consideration for pass given by carrier to one in view only of fact that he was member of city police force. *Marshall v. Nashville Ry. & L. Co.* (Tenn.), 151.

Evidence.

Conclusive force is to be given to the intrinsic effect of ticket tendered by passenger to pay such fare as is expressed on it. *Shelton v. Erie R. Co.* (N. J.), 70.

One who is ejected because he refused to tender his fare should not be permitted to testify that he was only joking, and that he really intended to pay his fare. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

Privileges evidenced by terms of street railway ticket or transfer check are not subject to limitation by mere rule of carrier, knowledge of which purchaser of ticket did not have, and could not conveniently have ascertained. *De Board v. Camden Interstate Ry. Co.* (W. Va.), 84.

Section 38 of general railway law of New Jersey, limiting rates of fare that may be charged by railroad companies, is constitutional. *Shelton v. Erie R. Co.* (N. J.), 70.

Tender of fare is not good if coupled with demand for change as condition precedent to giving up money. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

Tender of fare, offer to pay when about to be ejected from car does not constitute. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

TORTS.

See MALICIOUS PROSECUTION; MASTER AND SERVANT; NEGLIGENCE.

TRANSFERS.

See CARRIERS OF PASSENGERS; TICKETS AND FARES.

TRESPASSERS.

See CROSSINGS; LICENSEES; STOCK, INJURIES TO.

Duty of railroad as affected by fact of habitual use of track at certain point by trespassers with knowledge or acquiescence of railroad. *Louisville, etc., R. Co. v. Daniel* (Ky.), 493.

Ejection.

Evidence of prior malicious conduct of conductor when ejecting other trespassers. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

Liability for using more force than is necessary to eject trespasser from train. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

TRESPASSERS—Continued.

Measure of damages where unnecessary force was used in ejecting from train. *Louisville & N. R. Co. v. Cottengim* (Ky.), 659.

Liability for death of trespasser seen by engineer and fireman lying on track 80 or 90 yards from where he was struck by train. *Southern Ry. Co. v. Gullatt* (Ala.), 336.

Person riding on freight train by permission of conductor injured by explosion of boiler, railroad not liable in absence of willfulness and wantonness. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 629.

Right of trainmen to assume that trespasser will leave track. *Southern Ry. Co. v. Gullatt* (Ala.), 336.

TRIAL.

See JURORS.

Excessive verdict having been rendered, court's rulings did not cure misconduct of plaintiff's counsel in argument to jury. *Pullman Co. v. Pennock* (Tenn.), 179.

ULTRA VIRES.

See MASTER AND SERVANT.

VARIANCE.

See CROSSINGS; STOCK, INJURIES TO.

VICE PRINCIPALS.

See FELLOW SERVANTS.

WAREHOUSEMEN.

See BAGGAGE; TAXATION.

WATER AND WATERCOURSES.

Insufficient culvert in railroad's embankment causing flooding of land, liability of railroad. *Chicago, etc., Ry. Co. v. Ely* (Neb.), 171.

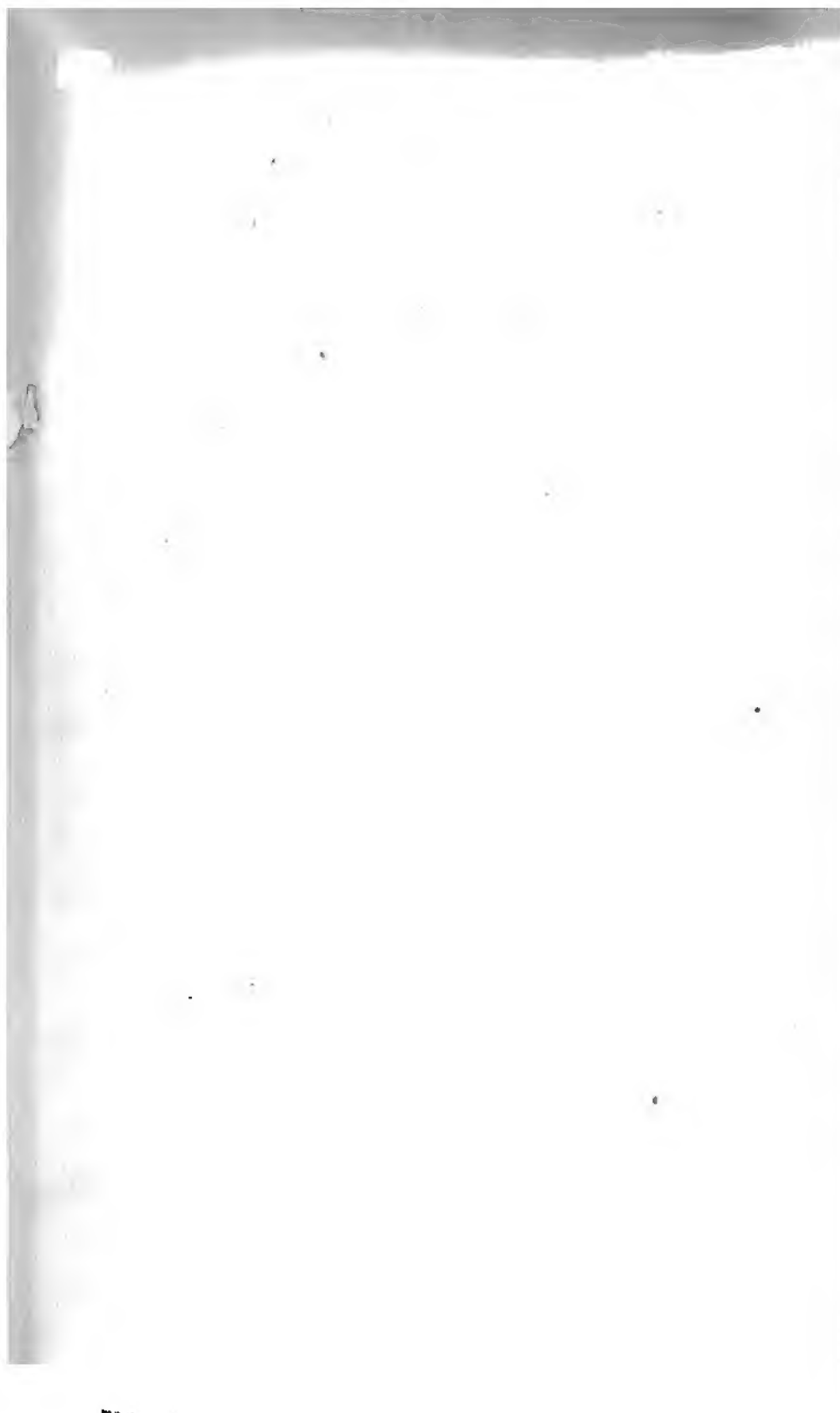
Plaintiff had no cause of action because of railroad's failure to keep open side ditches to divert and carry off water coming from higher land towards its track. *Greenwood v. Southern Ry. Co.* (N. Car.), 181.

WILLFULNESS.

See CROSSINGS; NEGLIGENCE.

YARDS.

See CARRIERS OF LIVE STOCK.



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